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No. 04-1396

In The Supreme Court of the United States

ROLLY J. SORRENTINO
and JOANN M. SORRENTINO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

PAUL H. SCHWARTZ
COOLEY GODWARD LLP
380 Interlocken Crescent
Suite 900
Broomfield, Colorado
80021-8023
(720) 566-4000

MATTHEW D. BROWN
Counsel of Record
COOLEY GODWARD LLP
One Maritime Plaza
20th Floor
San Francisco, California 94111
(415) 693-2000

LORI R.E. PLOEGER
COOLEY GODWARD LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, California 94306
(650) 843-5123

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

When the Internal Revenue Service claims it did not receive a tax document sent by a taxpayer, can a taxpayer prove timely delivery of a document to the Internal Revenue Service through testimony that the document was timely and properly mailed, in conformity with the long-standing common-law mailbox rule?

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PETITION FOR A WRIT OF CERTIORARI

Rolly J. and Joann M. Sorrentino respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The court of appeals' September 14, 2004 opinion (Appendix, *infra*, ("App.") 1-5) is reported at 383 F.3d 1187. The district court's October 25, 2001 opinion is reported at 171 F. Supp. 2d 1150. (App. 28-35.) The district court's January 8, 2002 opinion is reported at 199 F. Supp. 2d 1068. (App. 36-57.)

STATEMENT OF JURISDICTION

The court of appeals' judgment and opinion were entered on September 14, 2004. (App. 1-25.) The Sorrentinos timely filed a petition for rehearing and rehearing en banc on October 28, 2004. The court of appeals denied those petitions for rehearing on January 14, 2005. (App. 60-61.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

26 U.S.C. § 7502 (a) General rule. –

> **(1) Date of delivery.** – If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date

under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

(2) Mailing requirements. – This subsection shall apply only if –

(A) the postmark date falls within the prescribed period or on or before the prescribed date –

(i) for the filing (including any extension granted for such filing) of the return, claim, statement, or other document, or

(ii) for making the payment (including any extension granted for making such payment), and

(B) the return, claim, statement, or other document, or payment was, within the time prescribed in subparagraph (A), deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency, officer, or office with which the return, claim, statement, or other document is required to be filed, or to which such payment is required to be made.

* * *

(c) Registered and certified mailing; electronic filing. –

(1) Registered mail. – For purposes of this section, if any return, claim, statement, or other document, or payment, is sent by United States registered mail –

(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed; and

(B) the date of registration shall be deemed the postmark date.

(2) Certified mail; electronic filing. – The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail and electronic filing.

STATEMENT OF THE CASE

Rolly and Joann Sorrentino brought an action against the Internal Revenue Service ("IRS") under 26 U.S.C. § 7422 (1998), after the IRS disallowed their claim for a federal income tax refund. The couple sought to recover an overpayment of $8,551.00 for the 1994 tax year, plus interest and costs. The IRS disallowed the Sorrentinos' claim as untimely on the ground that they filed their 1994 return after the expiration of the three-year statute of limitations for refund claims. *See* 26 U.S.C. § 6511(b)(2)(A) (2001). To satisfy the three-year statute of limitations for their 1994 return, the Sorrentinos were required to file

their 1994 return on or before August 15, 1998.[1] The IRS conceded in the district court that the Sorrentinos overpaid their 1994 federal income taxes in the amount claimed.

Mr. Sorrentino completed the 1994 tax return by March 1, 1998. (App. 38.) Both he and Mrs. Sorrentino signed the return on March 1, 1998. (*Id.*) They presented a copy of the return dated March 1, 1998 as part of their summary judgment evidence. Mr. Sorrentino, although he could not recall the exact date he mailed the return, unequivocally testified that he mailed it during the first week of March 1998, more than four months before the filing deadline. (App. 63.) He testified that he personally placed the return in a mail drop at the United States Post Office in Wheat Ridge, Colorado, with proper postage affixed and properly addressed to the IRS's facility in Austin, Texas. (App. 63-64; *see also* App. 67, ¶ 10.) Specifically, he testified at deposition:

> Q. Do you recognize the document labeled Government Exhibit A?
>
> A. Yes, sir.
>
> Q. What is it, sir?
>
> A. This is a copy of our 1994 United States individual income tax return, Form 1040, and accompanying schedules. . . .
>
> Q. When did you sign this document labeled Government Exhibit A?
>
> A. March 1st, 1998.

---

[1] The Sorrentinos obtained an extension of the original due date for their 1994 tax return until August 15, 1995.

Q. And was this document or an original thereof mailed to the Internal Revenue Service?

A. Yes, it was.

Q. And when was that?

A. Within a day or two of March 1st, 1998. It may well have been March 1st, 1998.

Q. So are you unsure of the exact date?

A. I'm unsure of the exact date that it was deposited in the mail. My guess, it would have been without a doubt mailed within three to five days of March 1st, 1998, if it was not mailed on March 1st, 1998, but my recollection and awareness is that it was immediately subsequent to the signature, and the reason I say that is the signature is affixed to the final copy of this 1040 form after all the other information is filled out, including the accompanying schedules.

Q. Your 1994 form 1040 income tax return, was it you who mailed it?

A. Yes, I'm the one that mailed it.

Q. And how did you mail your 1994 return?

A. My recollection is I put it in a large envelope, rather than a small four and a half or three by five envelope, whatever it is, the five by nine envelopes, I used a nine by twelve envelope, full-size envelope, that carried this form, and I addressed it to the United States Internal Revenue Service in Austin, Texas, and I put it in that full-size envelope and deposited it in the United States mail postage prepaid at the Wheat Ridge, Colorado, post office, which is very near our house.

> Q. When you say you deposited the 1994 return in the mail at the post office, did you put it in a drop box outside or did you mail it inside?
>
> A. My recollection is that I took it inside and put it in the outgoing mail on the inside. . . . My recollection is I put it inside. And one of the reasons I say that is that's my normal procedure also, I generally go in, it's very easy to go in and drop it in the mail inside because I sometimes go check our post office box, which is right there. . . . My recollection is that I put stamps on the package, because I'm pretty aware of what it takes, and I took two first-class postage stamps, which may have totaled sixty some cents, and I mailed it there, but I do go in. There's a scale in the Wheat Ridge post office in the outside area there that you can put your mail on and mail it – I mean weigh it to see what it weighs so you can ensure that you have enough postage or sufficient postage on the envelope, and my recollection is that it required fifty-five cents of postage and I had two stamps on it which totaled more than fifty-five cents. That's my recollection.

(App. 62-65 (Deposition Transcript 8:2-11:2).) Mr. Sorrentino also attested that he made a follow-up call to the IRS in the summer of 1998 to check on the status of the tax refund. (App. 69, ¶ 15.)

The IRS moved for summary judgment on the ground that the district court lacked jurisdiction to entertain the suit because the Sorrentinos failed to meet 26 U.S.C. § 6511(a)'s three-year statute of limitations period. The district court denied the IRS's motion, holding that the Sorrentinos were entitled to a presumption of timely filing under the common-law mailbox rule, and granted the Sorrentinos' motion. The court rejected the IRS's arguments

that (1) 26 U.S.C. § 7502 supplants the common-law mailbox rule, and (2) the Sorrentinos failed to present adequate extrinsic evidence of mailing to benefit from the mailbox rule. The Sorrentinos then filed their own motion for summary judgment, relying on the mailbox rule's presumption that a properly addressed and stamped letter was timely delivered. The district court granted the Sorrentinos' summary judgment motion by order dated January 8, 2002. (App. 36-57.) The district court's final judgment was entered on January 9, 2002. (App. 58-59.) The IRS appealed from the final judgment to the United States Court of Appeals for the Tenth Circuit.

A fractured panel of the Tenth Circuit reversed the district court's judgment. All three judges wrote separate opinions. A majority of the panel, through Judge Baldock and Judge Seymour (dissenting), held that the common-law mailbox rule survived enactment of 26 U.S.C. § 7502. Judge Baldock separately added that to invoke the mailbox rule, a taxpayer cannot rely on his own sworn testimony, but must also provide "independent proof" of a postmark or mailing. (App. 17.)

Judge Seymour disagreed, stating that the new "independent evidence" requirement to the common-law mailbox rule was an unprecedented "evidentiary hurdle" that "denigrates the reliability and truthfulness of the scores of average taxpayers who prepare their own tax returns and place them in the U.S. mail without accompanying witnesses." (App. 24.) Judge Seymour added that the new hurdle "runs counter to the rule's very purpose," and that the new hurdle contradicts hornbook civil procedure and evidence law that permits the admission of affidavit testimony by a party in a lawsuit to defeat summary judgment. (*Id.*) Judge Hartz wrote a separate

opinion stating that section 7502 completely abolished the mailbox rule. (App. 19-22.)

REASONS FOR GRANTING THE WRIT

This case presents a question of exceptional importance to American taxpayers, which has deeply divided the courts of appeals: how can a taxpayer prove timely filing of a tax document? Under the splintered decision issued by a Tenth Circuit panel in this case, taxpayers face substantial uncertainty as to what evidence will suffice to create a fact issue as to whether a tax document was timely filed. This case provides an opportunity for this Court to clarify the showing required. The Tenth Circuit's decision is fundamentally inconsistent with the decisions of this Court in *Rosenthal v. Walker*, 111 U.S. 185 (1884), and *Hagner v. United States*, 285 U.S. 427 (1932), and decisions of other circuits that permit the invocation of the common-law mailbox rule based on the sender's testimony without requiring a postmark or other "independent evidence" of mailing.

The central issue on appeal was whether 26 U.S.C. § 7502 abolished the common-law mailbox rule for tax refund claims. Section 7502(a) provides that a document *which the IRS admits receiving* is deemed filed as of the date of its postmark. 26 U.S.C. § 7502(a). Section 7502(c) states that if a refund claim is sent by "registered mail," that registration is prima facie evidence that the document was "delivered." *Id.* § 7502(c). Section 7502(c) does not address what evidence a taxpayer may use to establish a filing when, as here, the IRS asserts that a refund claim sent by regular U.S. mail, rather than registered mail, was not delivered.

The courts of appeals have split sharply over whether the enactment of 26 U.S.C. § 7502 supplanted the common-law mailbox rule. Under the common-law mailbox rule,

> if a letter properly directed is proved to have been either put into the post-office or delivered to the postman, it is presumed, from the known course of business in the post-office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed.

Rosenthal, 111 U.S. at 193; *see also Hagner*, 285 U.S. at 430 ("The rule is well settled that proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed.") (citing *Rosenthal*).

Some circuits have held that section 7502 abolished the common-law mailbox rule. *See Miller v. United States*, 784 F.2d 728 (6th Cir. 1986); *Deutsch v. Comm'r*, 599 F.2d 44 (2d Cir. 1979); *Boccuto v. Comm'r*, 277 F.2d 549 (3d Cir. 1960). Others have held that the common-law mailbox rule survived the enactment of section 7502. *See Estate of Wood v. Comm'r*, 909 F.2d 1155 (8th Cir. 1990); *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992).

The three judges on the panel in this case issued three separate opinions setting forth three different rules. Judge Baldock concluded that section 7502 of the Internal Revenue Code did not supplant the common-law mailbox rule, but that the party seeking to benefit from the mailbox rule must present "independent evidence" of the mailing. (App. 2-18.) Judge Hartz issued an opinion concluding that

section 7502 abolished the common-law mailbox rule completely. (App. 19-22.) Finally, Judge Seymour concluded that the traditional mailbox rule applied and accordingly the Sorrentinos were not required to present any "independent evidence" that their return was timely dispatched. (App. 22-25.)

This Court should resolve the deep split in the circuits by making clear that section 7502 did not abolish the common-law mailbox rule as to situations the statute does not address, such as the present case when the IRS contends it did not receive a tax document. Section 7502 by its express terms does not address the common-law mailbox rule. In the face of Congress's silence, "[i]t is a well-established principle of statutory construction that the common law ought not to be deemed to be repealed, unless the language of the statute be clear and specific for this purpose." *Norfolk Redevelop. & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) (internal quotations, brackets, and ellipses omitted).

Nothing about the language of section 7502 compels the conclusion that Congress intended to abrogate the common-law mailbox rule. Rather, section 7502(a) simply provides that, when a postmark exists, the document is deemed timely filed by the date of its postmark, while section 7502(c) provides that when a document is sent by registered mail, the registration is prima facie evidence of delivery. These rules are sensible as far as they go. It is reasonable, for example, for Congress to conclude that if a postmark actually exists, it provides the best evidence of when a document was mailed. These rules simply do not address, however, much less purport to change the longstanding common-law rules regarding, the separate situation when the IRS claims no

delivery occurred and thus no presumptively-accurate postmark exists – all despite credible testimony by the taxpayer to the contrary.[2] Congress could have said in the statute that if no proof of delivery exists, it shall be deemed that no mailing occurred – thereby effectively forcing taxpayers to either send their documents by registered mail or else accept the risk of nondelivery by the Postal Service. But section 7502 does not begin to do so. If Congress intended to abolish the common-law mailbox rule, it needed to do so expressly.

Further, the independent evidence requirement imposed in this case conflicts with this Court's decisions in *Rosenthal* and *Hagner* as well as the decisions of other circuits permitting the invocation of the mailbox rule based on the sender's credible testimony. The mailbox rule's presumption of delivery is "founded on the probability that the officers of the government will do their duty and the usual course of business; and, when it is opposed by evidence that the letters never were received, must be weighed with all the other circumstances of the case, by the jury in determining the question whether the letters were actually received or not." *Rosenthal*, 111 U.S. at 193-94 (quoting *Huntley v. Whittier*, 105 Mass. 391 (1870)).

This Court's decisions applying the mailbox rule do not require the party invoking the rule to provide independent evidence of the mailing, but rather have allowed a party's credible testimony to support invocation of the mailbox rule's presumptions. In *Rosenthal*, the Supreme Court applied the mailbox rule when a person "testified he

[2] In this case, the district court believed and credited the Sorrentino's testimony.

had written to the plaintiff [] and mailed with his own hand in the post-office at St. Louis, postage prepaid, directed to the plaintiff [] in New Orleans, and to his proper address in that city." *Rosenthal*, 111 U.S. at 193. Similarly, in *Hagner*, the Supreme Court applied the mailbox rule when an indictment alleged that the defendants "did place and cause to be placed in the Post Office at [Scranton, Pennsylvania], to be sent and delivered by the Post Office establishment of the United States of America, to the addressee thereof, three certain accounts enclosed in a certain envelope addressed to [a specific address]." *Hagner*, 285 U.S. at 429.

Similarly, and again in conflict with the Tenth Circuit's approach in this case, other circuits have held that the sender's testimony, if credited, suffices to trigger the common-law mailbox rule's presumption. *See Schikore v. BankAmerica Supp. Retirement Plan*, 269 F.3d 956, 964 (9th Cir. 2001) ("We have held a sworn statement is credible evidence of mailing for purposes of the mailbox rule."); *Godfrey v. United States*, 997 F.2d 335, 338 (7th Cir. 1993) ("To invoke the presumption of delivery, the government could . . . present evidence of actual mailing such as an affidavit from the employee who mailed the check.").

The Tenth Circuit's decision is also in tension with two Ninth Circuit decisions: *Lewis v. United States*, 144 F.3d 1220 (9th Cir. 1998) and *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992). In *Anderson*, the Ninth Circuit upheld a district court award of a tax refund based on the taxpayer's testimony that "she saw the postal clerk postmark her return and place the envelope in the mailing pouch." *Anderson*, 966 F.2d at 489. Although Anderson's testimony was bolstered by that of a friend who testified

that she accompanied her to the post office and waited in the car, and that Anderson returned to the car without the envelope containing the tax return, the Ninth Circuit ultimately held: "Anderson provided direct proof of a timely postmark because she actually saw the postal clerk stamp her document." *Id.* at 491.

In its later *Lewis* decision, the Ninth Circuit, recognizing it is a rare case in which the taxpayer sees the actual postmarking, clarified that the *Anderson* decision did not depend on the taxpayer having witnessed the physical postmarking. Rather, "*Anderson* stands for the broad rule that if a taxpayer furnishes credible evidence of the date her letter to the Service was postmarked, that date is the date that controls." *Lewis*, 144 F.3d at 1223. Lewis's "circumstantial evidence supporting his word" consisted of proof that a state tax document typically filed at the same time as federal tax returns had been received. *Id.* at 1222. The Sorrentinos' production of a copy of the return signed and dated March 1, 1998 along with Mr. Sorrentino's testimony that he made a follow-up call to check on the status of the return constitutes circumstantial evidence at least as strong as that presented in *Lewis*.

Moreover, as Judge Seymour explained in her dissenting opinion, a party's own sworn testimony is unquestionably admissible to defeat summary judgment in an ordinary case. *See* App. 23 (citing and quoting 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2722 (at summary judgment, "[a]n affidavit of a party that is on file in the case will be considered by the court")). Imposing an "independent evidence" requirement in tax cases "by definition, denigrates the reliability and truthfulness of the scores of average taxpayers who prepare their own tax returns and

place them in the U.S. mail without accompanying witnesses. According to the majority, the courts cannot trust these taxpayers unless they have brought along friends who will swear to the mailing of their returns. Such a rule seems to me to be completely unwarranted." (App. 24.) Such a rule is supported neither by the statute nor the centuries-old mailbox rule.

It is the tried-and-true function of factfinders in our federal judicial system to determine facts based on the evidence according to the appropriate legal standard of proof. Judge Baldock's conclusion that "independent evidence" is required to satisfy the mailbox rule says, in effect, that federal judges are not competent to determine the timing of mailing according to the common-law legal standard of proof based on traditional sources and evidence, such as testimony. In essence, his approach legislates an additional evidentiary requirement. That requirement is not supported by the statute Congress enacted and is inconsistent with more than 100 years of precedent applying the common-law mailbox rule.

This case provides the Court with an opportunity to clarify what a taxpayer must demonstrate to establish that a tax document was timely filed and to resolve the conflicts between the Tenth Circuit's decision in this case and this Court's and other circuit precedent about what kind of evidence, if credited, suffices to invoke the presumptions afforded by the common-law mailbox rule. Taxpayers across the country would benefit from clarity regarding the required showing to invoke the mailbox rule in connection with a federal tax refund claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MATTHEW D. BROWN
Counsel of Record
COOLEY GODWARD LLP
One Maritime Plaza
20th Floor
San Francisco, California 94111
(415) 693-2000

PAUL H. SCHWARTZ
COOLEY GODWARD LLP
380 Interlocken Crescent
Suite 900
Broomfield, Colorado 80021-8023
(720) 566-4000

LORI R.E. PLOEGER
COOLEY GODWARD LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, California 94306
(650) 843-5123

Counsel for Petitioners

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ROLLY J. SORRENTINO; JOANN M. SORRENTINO, Husband & Wife, Plaintiffs-Appellees, v. INTERNAL REVENUE SERVICE; UNITED STATES OF AMERICA, Defendants-Appellants.	Nos. 02-1114 & 02-1137
STEVEN G. SKLAVER, Amicus Curiae.	

APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 01-K-129)

(Filed Sep. 14, 2004)

Rolly J. Sorrentino and Joann M. Sorrentino, Pro Se.

Robert W. Metzler, Attorney, Tax Division (Eileen J. O'Connor, Assistant Attorney General and Kenneth L. Greene, Attorney, Tax Division, Department of Justice, Washington D.C., and John W. Suthers, United States Attorney, Denver, Colorado,

with him on the brief), Department of Justice, Washington, D.C., for Defendants-Appellants.

Steven G. Sklaver of Cooley Godward LLP, Broomfield, Colorado, as Court-Appointed Amicus Curiae.

Before **SEYMOUR**, **BALDOCK**, and **HARTZ**, Circuit Judges.

BALDOCK, Circuit Judge, delivering the Judgment of the Court and an Opinion.

HARTZ, Circuit Judge, concurring in the Judgment only and delivering an Opinion.

SEYMOUR, Circuit Judge, dissenting from the Judgment and delivering an Opinion.

BALDOCK, Circuit Judge.

Internal Revenue Code (I.R.C.) § 7422(a) authorizes a taxpayer to commence a tax refund suit against the Government once "a claim for refund or credit has been duly filed" with the Internal Revenue Service (IRS). Section 6511 of the I.R.C. limits the Government's waiver of immunity under § 7422(a) by requiring a taxpayer to file a claim for refund or credit with the IRS within a specified period of time. Thus, the taxpayer's timely filing of such claim with the IRS is a jurisdictional prerequisite to maintaining a tax refund suit against the Government. *See United States v. Dalm*, 494 U.S. 596, 602 (1990). In

this case, we conclude the district court lacked jurisdiction over Plaintiffs-Taxpayers' refund suit based upon their failure to timely file a refund claim with the IRS.

I.

Defendant IRS granted Plaintiff-Taxpayers Rolly and Joann Sorrentino a four month extension of time, or until August 15, 1995, to file their 1994, 1040 income tax return. Taxpayers, apparently awaiting an "INPOL Report" from the IRS, maintain they mailed their 1994 return to the IRS via regular United States postal mail in early March 1998, two and one-half years after its due date.[1] On their return, Taxpayers claimed a refund of $8,551 based on excess wage withholding during the 1994 taxable year. The IRS disallowed Taxpayers' refund claim as untimely. The IRS maintained it had no record of receiving Taxpayers' 1994 return until October 1998.

Taxpayers, appearing *pro se,* filed this lawsuit after the IRS disallowed their refund claim. The IRS moved for summary judgment based on Taxpayers' inability to establish the IRS received their refund claim on or before August 15, 1998.[2] Over the IRS's objection, the district

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[1] According to the district court, an "INPOL Report" is a transcript of a taxpayer's income as reported to and recorded by the IRS during a given taxable year. *Sorrentino v. United States,* 199 F. Supp. 2d 1068, 1071 (D. Colo. 2002).

[2] The parties agree the applicable limitations period under I.R.C. § 6511 for Taxpayers' refund claim is three years from the fifteenth day of the fourth month following the close of the taxable year in which the withholding occurred, plus the period of any extension; or, in this case, three years from August 15, 1995. We accept this date and leave the task of unraveling § 6511's jargon to another day. *See Weisbart v. United States Dept. of Treasury,* 222 F.3d 93, 94-96 (2d Cir. 2000).

court applied the common law mailbox rule, which provides proof of mailing of a properly addressed communication bearing proper postage creates a rebuttable presumption the communication was received. Accordingly, the district court denied the IRS's motion:

> Applying the common law mailbox rule to this case, the Sorrentinos are entitled to a rebuttable presumption that they timely filed their refund claim for the 1994 tax year upon proof they properly mailed their 1994 tax return in time for it to be delivered to the IRS before the [August] 15, 1998 deadline. Mr. Sorrentino has testified he properly mailed the 1994 return in early March, 1998, which provided more than ample time for the return to reach the IRS in the ordinary course of the mail before the [August] 15 deadline. Mr. Sorrentino's account of an early March mailing is supported by the March 1 signature date on the photocopied return the IRS acknowledges receiving and by Mr. Sorrentino's testimony that he followed up on the status of the return before the October 2, 1998 filing date asserted by the IRS.

Sorrentino v. United States, 171 F. Supp. 2d 1150, 1154 (D. Colo. 2001) (*Sorrentino I*).[3]

At the district court's encouragement, Taxpayers also moved for summary judgment. *See id.* In response, the IRS did not dispute the substance of Taxpayers' refund claim. Rather, the IRS argued, among other things, that Mr. Sorrentino's sworn statements of proper mailing in a

[3] The district court mistakenly referred to the deadline as April 15, 1998.

deposition and affidavit were uncorroborated, self-serving, and insufficient to establish actual mailing in March 1998. The district court disagreed, holding "the United States failed to produce evidence rebutting the presumption [arising from the common law mailbox rule] that the Sorrentinos' return was delivered to it and thus filed on or about March 8, 1998." *Sorrentino v. United States,* 199 F. Supp. 2d 1068, 1078 (D. Colo. 2002) (*Sorrentino II*). The court entered judgment in favor of Taxpayers, awarding them a refund of $8,551 plus interest.

The IRS appeals, arguing (1) I.R.C. § 7502 supplants the common law mailbox rule, and (2) Taxpayers' self-serving statements are insufficient to establish actual mailing in March 1998. Our jurisdiction arises under 28 U.S.C. § 1291. We apply the same summary judgment standard to our record examination as the district court and review its judgment de novo. *See Kinross v. Utah Ry. Co.,* 362 F.3d 658, 660 (10th Cir. 2004). Applying this standard, we reverse and remand with instructions to dismiss Taxpayers' suit for want of subject matter jurisdiction.

II.

The Supreme Court first acknowledged the common law mailbox rule in *Rosenthal v. Walker,* 111 U.S. 185 (1884). In *Rosenthal,* a case involving fraud in bankruptcy, the Court explained:

> The rule is well settled that if a letter properly directed *is proved* to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its

> destination at the regular time, and was received by the person to whom it was addressed.

Id. at 93 (emphasis added). We subsequently applied the mailbox rule in *Crude Oil Corp. v. Commissioner,* 161 F.2d 809 (10th Cir. 1947). *Crude Oil* was a tax deficiency suit arising out of a taxpayer's alleged failure to make a timely capital stock election. Although we did not describe the taxpayer's evidence, we concluded the evidence presented was sufficient to establish the taxpayer enclosed his return in a properly addressed and stamped envelope that was deposited "in time to have been received by the Collector, in the ordinary course of mail, within the statutory filing period." *Id.* at 810. We stated: "*[p]roof* of due mailing is prima facie evidence of receipt." *Id.* (emphasis added). "When mail matter is properly addressed and deposited in the United States mails, with postage duly prepaid thereon, there is a rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail." *Id.*

In *United States v. Peters,* 220 F.2d 544 (10th Cir. 1955), however, we rejected application of the mailbox rule in a tax refund suit without citing *Crude Oil.* Instead, we applied the "physical delivery rule" which deems a tax document filed when it is delivered to and received by the IRS:

> The depositing of the claims for refund in the post office in time for them to reach the post office box or drawer of the Collector in due course of mail before the expiration of the time fixed by law for the filing of such claims did not constitute the filing of them. They were not filed within the intent and meaning . . . of the Internal Revenue Code until they reached the Collector[.]

Id. at 545 (citing *United States v. Lombardo,* 241 U.S. 73 (1916)).[4]

After *Peters,* taxpayers in the Tenth Circuit faced substantial uncertainty concerning the timely filing of tax documents. Amidst this confusion, Congress enacted I.R.C. § 7502 in 1954. As originally enacted, § 7502 only applied to the filing of tax documents other than tax returns and payments. *See* Internal Revenue Code of 1954, ch. 736, 68A Stat. 895. In 1966, Congress amended § 7502 to encompass tax returns and payments as well. *See* Act of Nov. 2, 1966, Pub. L. No. 89-713, § 5(a), 80 Stat. 1110. The current version of § 7502, which applies in this instance, provides in relevant part:

> **§ 7502. Timely mailing treated as timely filing and paying**
>
> **(a) General Rule. –**
>
> **(1) Date of delivery.** – If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required

[4] In *Lombardo,* the Court held the phrase "shall file" as used in the "White Slave Traffic Act," meant "to deliver to the office and not send through the United States mails. A paper is filed when it is delivered to the proper official and by him received and filed." 241 U.S. at 76 (internal citation omitted); *compare* I.R.C. § 6072(a) (providing the general rule for the timely filing of personal income tax returns).

to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

* * *

(c) Registered and certified mailing; electronic filing. –

(1) Registered Mail. – For purposes of this section, if any return, claim, statement, or other document, or payment, is sent by United States registered mail –

(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed; and

(B) the date of registration shall be deemed the postmark date.

(2) Certified mail; electronic filing. – The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail and electronic filing.[5]

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[5] By its plain language, § 7502(a)(1) applies only when a tax return is in fact delivered to the IRS. *See* 26 C.F.R. § 301.7502-1(e). The postmark is deemed the date of filing. A Senate report explained the amendment:

> The bill . . . provides that the timely mailing of a tax return or payment is to be considered timely filing or timely payment. As a result, where the postmark on an envelope in

(Continued on following page)

Some courts have construed the current version of § 7502 as supplanting the common law mailbox rule entirely. Specifically, the Second and Sixth Circuits have held, absent a physical postmark, the physical delivery rule applies to tax refund and deficiency suits subject only to the exceptions contained in subsection (c) regarding registered, certified, and electronic mail receipts. *See Deutsch v. Commissioner,* 599 F.2d 44 (2d Cir. 1979); *Miller v. United States,* 784 F.2d 728 (6th Cir. 1986). In *Deutsch,* a tax deficiency suit, the taxpayer offered the affidavit of his accountant who stated he mailed a copy of the relevant tax document within the prescribed time period. The Court held for the IRS as a matter of law, stating "[t]he exception embodied in § 7502 . . . demonstrate[s] a penchant for an easily applied, objective standard." *Deutsch,* 599 F.2d at 46. *See also Boccuto v. Commissioner,* 277 F.2d 549, 553 (3d Cir. 1960) (stating the exceptions contained within the original version of § 7502 are the only exceptions to the physical delivery rule). Similarly in *Miller,* a tax refund suit, the Sixth Circuit held the district court lacked jurisdiction over the taxpayer's claim for refund where the IRS records failed to establish a refund claim was ever received. The Sixth Circuit so held notwithstanding the

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which an individual income tax return and payment are enclosed show that it was mailed on or before the due date, the return and payment will be considered as filed or paid on time even though received after the due date.

S. Rep. No. 1625 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3676, 3677. Section 7502(c)(1) meanwhile provides a taxpayer may produce a dated registered mail receipt to establish a prima facie case of delivery and thus guard against the risk of nondelivery. Similarly, per subsection (c)(2), 26 C.F.R. § 301.7502-1(c)(2) & (d) provide a taxpayer may produce a dated certified or electronic mail receipt to establish such case and guard against such risk.

taxpayer's offer of proof of timely mailing to the IRS. Relying on *Deutsch,* the court concluded the only exceptions to § 7502's physical delivery rule are those found in the statute. *Miller,* 784 F.2d at 731; *accord Surowka v. United States,* 909 F.2d 148, 150-51 (6th Cir. 1990).[6]

Other courts have held § 7502 does not supplant the common law mailbox rule. Instead, these courts have viewed the issue as an evidentiary matter, holding a taxpayer to a strict standard of proof before invoking a presumption of receipt. Self-serving declarations of mailing, without more, are insufficient to invoke the presumption. *See Estate of Wood v. Commissioner,* 909 F.2d 1155 (8th Cir. 1990); *Anderson v. United States,* 966 F.2d 487 (9th Cir. 1992). In *Wood,* a tax deficiency suit, the Eighth Circuit concluded § 7502 did not "completely displace the common law presumption of delivery." *Wood,* 909 F.2d at 1160. There, the representative of the estate testified he watched the postmistress of a "one-room" post office "weigh the envelope, put postage on it, cancel it, and put it into the appropriate bundle of outgoing mail." *Id.* at 1157. The postmistress also testified, recalling she postmarked the envelope and placed it in the outgoing mail. The Commissioner, on the other hand, "adduced no evidence before the tax court that the IRS did not receive the return." *Id.* The court rejected the IRS's argument that § 7502 "requires *actual* delivery" under subsection (a)(1) or proof of delivery by the taxpayer under subsection (c). *Id.*

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[6] In *Carroll v. Commissioner,* 71 F.3d 1228, 1231 (6th Cir. 1995), the Sixth Circuit reluctantly reaffirmed *Miller* despite the taxpayer's "unimpeachable proof of mailing." *Id.* The court noted it had recently reaffirmed *Miller* and declined to reconsider the decision en banc. *Id.* at 1232.

at 1158. In other words, the IRS argued "absent registration or certification . . . the taxpayer bears the risk of loss as to any document which the IRS *claims* not to have actually received." *Id.* Instead, the Court read § 7502(c) as a "safe harbor" because Congress intended § 7502 to benefit the taxpayer. *See* H.R. Rep. No. 1337, *reprinted in* 1954 U.S.C.C.A.N. 4025.

> Whether or not the common law presumption continues to exist generally, we simply do not agree that by the enactment of § 7502, Congress intended to foreclose application of a presumption of delivery within § 7502(a)(1) *in those cases in which the postmark requirements of the section can be conclusively established,* as here.

Id. at 1160 (emphasis added).[7]

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[7] The Tax Court's en banc opinion in *Estate of Wood v. Commissioner,* 92 T.C. 793 (1989) (en banc), *aff'd* 909 F.2d 1155 (8th Cir. 1990), like the three separate opinions in this case, illustrates the differing views on the question of whether § 7502 supplants the mailbox rule. Eight judges concluded the taxpayer could rely on a presumption that the IRS received a properly mailed document absent evidence to rebut the presumption:

> The prima facie evidence rule of § 7502(c) appears to be a "safe harbor" within § 7502. In other words, if taxpayers mail by registered or certified mail they are assured of having prima facie evidence of delivery by presenting the postmarked receipt. The provision for Congressionally sanctioned, assured method of proof, however, does not in law or logic forbid any other method unless Congress expressed intent to exclude other methods. No such expression exists [in § 7502].

Id. at 797-98. Five judges concurred in the result because of "the rare concurrence of events by which [taxpayer] was able to prove . . . the date of the postmark without physical evidence[.]" *Id.* at 802. Five judges dissented because "the presumption of delivery upon proof of first class mailing cannot be used to supply the delivery requirement of § 7502." *Id.*

The Ninth Circuit followed *Wood*'s reasoning in *Anderson,* a tax refund suit. In *Anderson,* the taxpayer testified at trial that she witnessed the postal clerk postmark her return and place the envelope in the mailing pouch. Additionally, a friend who accompanied the taxpayer to the post office testified she saw the taxpayer go into the post office with the return and come out of the post office without the return. The court rejected the IRS's argument that "the provisions of 26 U.S.C. § 7502 set forth the exclusive means available to taxpayers who wish to prove timely filing of a federal tax return or claim for refund." *Anderson,* 966 F.2d at 489. Rather, the Court held "[a]s applied to the facts of [taxpayer's] case, the language of § 7502 does not set forth an exclusive limitation on admissible evidence to prove timely mailing and does not preclude application of the common law mailbox rule." *Id.*

> We find that the facts in [taxpayer's] case are analogous, and adopt the Eighth Circuit's reasoning in *Wood.* [Taxpayer] provided direct proof of a timely postmark because she actually saw the postal clerk stamp her document. In such circumstances, we find that [taxpayer] was able to establish that her . . . return was [timely] postmarked. . . .

Id. at 491.

Lastly, two unpublished circuit court decisions addressing the issue at hand are noteworthy. In *Davis v. United States,* 2000 WL 194111 (Fed. Cir. 2000) (unpublished), the Federal Circuit held a taxpayer's uncorroborated testimony was insufficient "under any view of the law" to establish timely filing of a refund claim:

> Even if [taxpayer] were given the benefit of the more liberal approaches of the Eighth and Ninth

> Circuits, his own uncorroborated testimony would be insufficient to prove timely filing of his refund claim. . . . [I]n *Wood,* the taxpayer triggered the presumption of timely receipt by the IRS through testimony of the postal worker who handled, stamped, and postmarked the refund claim. The taxpayer in *Anderson* offered corroborating testimony from a person who accompanied her to the post office. [Taxpayer] presented no testimony, other than his own, to establish that he timely mailed his refund claim. Thus he did not present evidence sufficient to trigger a presumption of receipt of the claim by the IRS.

Id. at **3. In *Wade v. Commissioner,* 1999 WL 508672 (10th Cir. 1999) (unpublished), we upheld the Tax Court's finding the taxpayer did not mail his 1984 return in 1988 as he claimed:

> A return is filed as a matter of law when it is delivered to and received by the IRS. There are exceptions to the "receipt by the IRS" requirement where the evidence is persuasive that the taxpayer did file the return. In the instant case, however, there is not nearly enough evidence to establish that the tax court clearly erred when it found [taxpayer] did not file his 1984 return.
>
> [Taxpayer] has presented a 1984 return dated 1988. He has testified he remembers mailing the return immediately before lunch with his accountant in 1988. The only evidence [taxpayer] presents to suggest the Tax Court erred, is his own self-supporting testimony at trial.

Id. at **2.

III.

As the case law illustrates, the question of what, if anything, remains of the common law mailbox rule after § 7502 is not easily answered.[8] I do not question that a strict construction of § 7502, such as the approach of the Second and Sixth Circuits (and Judge Hartz), provides "an easily applied, objective standard." *Deutsch,* 599 F.2d at 46. Yet I am not prepared, based upon § 7502's plain language, to hold a taxpayer may *never* prove delivery to the IRS of the "undelivered return" in the absence of a registered, certified, or electronic mail receipt. In other words, given the uncertainty as to what extent, if any, Congress intended to supplant the mailbox rule in enacting § 7502, I decline to hold the production of a registered, certified, or electronic mail receipt are the only means by which a taxpayer may establish timely delivery.

Congress is the final arbiter of tax policy, not this Court. If Congress wishes to restrict the taxpayers' means of proving delivery of tax documents, Congress can easily amend § 7502 to establish "an easily applied, objective standard." Section 7502's silence, however, is insufficient to entirely supplant the mailbox rule because "[i]t is a well-established principle of statutory construction that the common law ought not to be deemed to be repealed, unless the language of the statute be clear and specific for this purpose." *Norfolk Redevelopment & Housing Auth. v.*

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[8] *See generally* Kimberly C. Metzger, *Interpretation of the § 7502 Timely-Mailing, Timely-Filing Requirements: Carroll v. Commissioner and the Liberal/Conservative Interpretation Dilemma,* 28 U. Tol. L. Rev. 767 (1997). For a list of the differing federal court decisions addressing I.R.C. § 7502's effect on the common law mailbox rule, see Research Institute of America, *Federal Tax Coordinator* ¶ T-10774 (2d ed. 2004).

Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35 (1983) (internal quotations, brackets, and ellipses omitted). I decline to adopt the IRS's argument that § 7502 abolishes the mailbox rule because, contrary to Judge Hartz's view, the present language of § 7502 *does not compel* such a result. "Congress must change the statute's words if a different result is desired as a matter of tax policy." *Commissioner v. Soliman*, 506 U.S. 168, 180 (1993) (Blackmun, J. concurring).[9]

At the same time, I deem unwise Judge Seymour's apparent unconditional endorsement of the mailbox rule based solely upon a taxpayer's uncorroborated self-serving testimony of mailing, especially where that taxpayer has a history of filing untimely returns. Such an endorsement would necessarily result in a jury trial every time a taxpayer, regardless of the surrounding circumstances, alleges timely mailing. No Circuit Court has made such an endorsement and, unlike Judge Seymour, I decline Taxpayers' invitation to be the first. I agree with the Eighth and Ninth Circuits' narrow holdings in *Wood* and *Anderson*, which turned on (1) evidence of an actual postmark, and (2) evidence of mailing apart from the taxpayer's self-serving testimony. Like the Eighth Circuit, I would require more than mere proof of mailing, such as direct proof of

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[9] Judge Hartz criticizes the venerable rule of construction (of which Congress undoubtedly is aware) that statutes in derogation of the common law should be strictly construed. He suggests replacing it (at least in this case) with a "compelling inference" test. *See* Concur. Op. at 20-21. I doubt such a test would bring any more certainty to statutory construction. In any event, I cannot agree that § 7502, reasonably construed, compels the inference that Congress intended to entirely abolish the common law mailbox rule in tax cases where compelling evidence of mailing exists.

postmark which is "verifiable beyond any self-serving testimony of a taxpayer who claims that a document was timely mailed." *Wood,* 909 F.2d at 1161. As the Ninth Circuit opined in *Lewis v. United States,* 144 F.3d 1220, 1222 (9th Cir. 1988): "The Service, of course, does not have to take a taxpayer's unsupported word, but when a taxpayer with an unblemished record for paying taxes produces *circumstantial evidence supporting his word,* the government needs more than a skeptical smile to support its doubt of credibility." (emphasis added).

Allegations of mailing are easy to make and hard to disprove. *Cf. Benavidez v. City of Albuquerque,* 101 F.3d 620, 626 (10th Cir. 1996) (recognizing that proving a negative may be difficult). Because the taxpayer, not the IRS, controls the mailing of a tax return, the taxpayer, not the IRS, has access to any evidence demonstrating the return has been mailed. To establish a presumption of delivery outside the exceptions to the physical delivery rule contained in § 7502, the burden in these types of cases thus rests on the taxpayer to make "a meaningful evidentiary showing" at the outset. *Cf. National Archives and Records Admin. v. Favish,* 124 S. Ct. 1570, 1582 (2004).[10]

To be sure, the IRS loses tax returns; nevertheless, the taxpayer is in the best position with the clock running to protect himself by procuring independent evidence of postmark and/or mailing, whether by mail receipt, corroborating

[10] As Judge Seymour suggests, allegations of non-receipt may be as difficult to disprove as allegations of receipt. *See* Dissent. Op. at 23. The critical difference is the burden of proof in these types of cases is on the taxpayer, not the IRS. Only after the taxpayer proffers sufficient proof to raise a presumption of timely mailing does the burden of production shift to the IRS to proffer sufficient proof of non-receipt.

testimony, or otherwise. This is especially true where a refund or credit is involved because no cancelled check will exist to verify receipt. Accordingly, I would hold that absent some proof of an actual postmark or dated receipt, a presumption that tax documents allegedly mailed to the IRS were in fact received does *not* arise based solely upon a taxpayer's self-serving testimony.[11] Despite Judge Seymour's contrary assertion, such a holding does not require a credibility determination. Rather, such testimony alone, assuming its truth, is insufficient as a matter of law to establish a presumption of timely delivery.

IV.

In this case, Taxpayers, who have a history of filing belated returns, offered no independent proof of a postmark or any evidence of mailing apart from Mr. Sorrentino's self-serving testament. Unlike Judge Seymour, I do not believe Mr. Sorrentino's testament is sufficient to invoke the mailbox rule's rebuttable presumption. Judge Seymour's logic is flawed, in my opinion, because she apparently believes the mailbox rule creates the "factual presumption." *See* Dissent. Op. at 1198. To the contrary, as her recitation of the mailbox rule reveals, *see id.* at 22, *proper and timely mailing raises* a rebuttable presumption that the mailing was in fact received by the addressee. I simply would hold Taxpayers to their burden of making a

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[11] A taxpayer who timely mails his tax return should know well before expiration of the limitations period whether the IRS in fact received the return. To illustrate, after expiration of the filing period, a taxpayer claiming a refund may normally expect such refund within forty-five days, *see* I.R.C. § 6611(e), well within § 6511's three year statute of limitation.

meaningful evidentiary showing of "proper and timely" mailing before invoking the presumption.

In their respective depositions, Taxpayers stated they signed and dated their 1994 joint return on March 1, 1998. Perhaps so, but unlike Judge Seymour, I do not find such particularly probative of "proper and timely" mailing. *See id.* at 23. Importantly, on this point, Mrs. Sorrentino offers no proof – she did not mail the return or see Mr. Sorrentino prepare the return for mailing or take the return to the post office. Mr. Sorrentino could not recall the specific date he mailed the return, but stated he mailed it to the IRS, postage affixed, sometime during the first five days of March 1998. He did not use certified or registered mail; nor did he see any postal worker stamp a postmark on the envelope. Mr. Sorrentino further stated that in September 1998, over six months after mailing his return, he contacted the IRS to inquire on the status of the refund. When informed the IRS had no record of receiving the return, he faxed the IRS a copy of the return which was stamped "Received 10-2-98, IRS, Austin Texas." Under any view of Circuit Court precedent construing the current version of I.R.C. § 7502, Mr. Sorrentino's self-serving testimony, without corroborating evidence, is insufficient to raise a presumption the IRS received Taxpayers' 1994 tax return prior to October 2, 1998.

Accordingly, we REVERSE the judgment of the district court and REMAND with instructions to dismiss Taxpayers' refund suit for want of subject matter jurisdiction. The district court's order awarding fees and costs to the Taxpayers pursuant to I.R.C. § 7430 is VACATED.

HARTZ, Circuit Judge, concurring in the result.

I concur with Judge Baldock in reversing the judgment of the district court and remanding with instructions to dismiss Taxpayers' refund suit for want of subject matter jurisdiction. I respectfully disagree, however, with respect to the grounds for reversal.

Both Judge Baldock and Judge Seymour believe that the common-law mailbox rule survives the enactment of I.R.C. § 7502. They apparently read that statute as merely providing a safe harbor for proving timely delivery of a tax document or payment – the taxpayer is home free if the taxpayer has a receipt for registered or certified mail, but the taxpayer may still be able to prove timely delivery by other evidence. I do not share that belief.

If § 7502(c) had only paragraph "(1)" – which states that proper registration of an item of mail is prima facie proof of timely delivery – I might agree with the interpretation of § 7502 shared by the other members of this panel. But it is too difficult to square § 7502(c)(2) with their interpretation. In 1958, § 7502(c) was amended by adding to the registered-mail provision, the following language:

> (2) Certified mail. – The Secretary [of the Treasury] is authorized to provide by regulations the extent to which the provisions of paragraph (1) of this subsection with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail.

If the common-law mailbox rule survived enactment of § 7502, this new paragraph is problematic in two ways. First, why did Congress bother to enact a provision enabling the Secretary to issue a certified-mail regulation? Under I.R.C. § 7805(a) the Secretary has general authority

to "prescribe all needful rules and regulations for the enforcement of [the I.R.C.]." This authority is frequently and forcefully exercised. An interpretative regulation under § 7805 could have set forth how the common-law mailbox rule applies to certified mail. I recognize that under current law an explicitly authorized regulation may be entitled to greater deference in the courts than a regulation authorized only by § 7805. *See generally* Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B. U. L. Rev. 185, 210-11 (2004). I do not, however, believe that such a subtlety could have motivated the 1958 Congress.

Second, if the common-law mailbox rule survived § 7502, why did Congress limit the Secretary's regulatory authority to promulgating regulations solely with respect to certified mail? Why not also give the Secretary explicit authority to issue regulations concerning when evidence regarding *regular* mail constitutes prima facie proof of timely delivery? There may be clever answers to my (intended-to-be) rhetorical questions concerning § 7502(c)(2); but I suspect they would smell of the lamp.

Judge Baldock's analysis of the matter invokes the "'well-established principle of statutory construction that the common law ought not to be deemed to be repealed, unless the language of the statute be clear and specific for this purpose.'" Op. at 13-14 (quoting *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983)). This canon of construction, however, can eviscerate the will of Congress if not confined to its proper sphere. It is, at most, an aid in interpreting statutory language. There is no public policy against changing the common law. The canon should not be used (misused), as it has been in the past, as a tool of courts

hostile to legislative innovation. *See generally* Roscoe Pound, *Common Law and Legislation,* 6 Harv. L. Rev. 383 (1908). As Dean Pound wrote almost a century ago:

> The proposition that statutes in derogation of the common law are to be construed strictly . . . assumes that legislation is something to be deprecated. As no statute of any consequence dealing with any relation of private law can be anything but in derogation of the common law, the social reformer and the legal reformer, under this doctrine, must always face the situation that the legislative act which represents the fruit of their labors will find no sympathy in those who apply it, will be construed strictly, and will be made to interfere with the *status quo* as little as possible. . . . Some regard this attitude toward legislation as a basic principle of jurisprudence. Others are content to make of it an ancient and fundamental principle of the common law. In either event they agree in praising it as a wise and useful institution. It is not difficult to show, however, that it is not necessary to and inherent in a legal system; that it is not an ancient and fundamental doctrine of the common law; that it had its origin in archaic notions of interpretation generally, now obsolete, and survived in its present form because of judicial jealousy of the reform movement; and that it is wholly inapplicable to and out of place in American law of today.

Id. at 387-88 (footnotes omitted).

Of course, statutes may employ terms of art that have a meaning provided by the common law, and one can ordinarily assume that the statutory meaning does not depart from the common-law meaning. Also, the common law is an essential component of the fabric of the law,

providing background assumptions against which statutory language should be read. But we should not impose a "clear-statement" rule requiring that statutory language explicitly negate every common-law proposition on the subject. We must not forget that our task is to construe the statutory language, not to establish an obstacle course for those who draft the laws. The persuasiveness of *Norfolk Redevelopment,* for example, rests on the point that the statute at issue took the pertinent language from a previous statute that clearly preserved the common-law rule.

In the case before us, the statutory language compels the inference that § 7502 was intended to occupy the field, providing the sole means by which timely delivery can be proved. Because Taxpayers' proof does not meet the statutory requirements, their refund claim must be treated as untimely.

SEYMOUR, Circuit Judge, dissenting.

While I agree with Judge Baldock's conclusion that I.R.C. § 7502 does not entirely supplant the common law mailbox rule, Op. at 1193-94, I must dissent from his application of the mailbox rule in this case. Judge Baldock's opinion relies, improperly in my judgment, upon a credibility determination to dismiss the Sorrentinos' suit at the summary judgment stage and erects an unreasonable barrier to the mailbox rule's implementation.

"Under the common law mailbox rule, proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee." *Anderson v. United States,* 966 F.2d 487, 491 (9th Cir. 1992) (citing *Rosenthal v. Walker,* 111 U.S. 185, 193-94 (1884)). According to Judge Baldock, the Sorrentinos' "self-serving testimony, without corroborating evidence, is insufficient to

raise a presumption the IRS [timely] received Taxpayers' 1994 tax return." Op. at 17. But any testimony by a party to a suit is self-serving, yet it is clearly admissible to support his or her case in a motion for summary judgment. *See* 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2722 (at summary judgment, "[a]n affidavit of a party that is on file in the case will be considered by the court"). The self-serving quality of the testimony goes to its credibility, which is to be judged by the trier of fact. Credibility determinations are not to be made at summary judgment, and are certainly not to be made by an appellate court. *Foster v. Alliedsignal, Inc.*, 293 F.3d 1187, 1195 (10th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)) (noting credibility determinations are inappropriate at summary judgment); *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985) (explaining trial court is in unique position to judge credibility and its determinations deserve great deference from appellate court).

I am doubtful of the worth of the corroborating evidence Judge Baldock's rule requires. The corroborating evidence in *Anderson*, 966 F.2d at 489, consisted of the testimony of a friend who accompanied the taxpayer to the post office, watched the taxpayer go in with her tax return, and exit without it. *Id.* I question why this evidence is substantially more convincing than that presented by the Sorrentinos, including the sworn testimony of Mr. and Mrs. Sorrentino that they signed the return in early March, the sworn testimony of Mr. Sorrentino that he mailed the return in early March, and a copy of the return dated March 1, 1998.

More significantly, I question the wisdom of a rule which, by definition, denigrates the reliability and truthfulness of the scores of average taxpayers who prepare their own tax returns and place them in the U.S. mail without accompanying witnesses. According to the majority, the courts cannot trust these taxpayers unless they have brought along friends who will swear to the mailing of their returns. Such a rule seems to me completely unwarranted.

Ultimately, however, I dissent because Judge Baldock's evidentiary hurdle to the factual presumption of the mailbox rule runs counter to the rule's very purpose. Judge Baldock justifies his conclusions by stating: "[a]llegations of mailing are easy to make and hard to disprove." Op. at 15. Of course, the same is true of allegations of non-receipt. The mailbox rule is designed to redress this state of inconclusive evidence, and does so, *initially,* in favor of the party claiming mailing. *See Schikore v. BankAmerica Supplemental Ret. Plan,* 269 F.3d 956, 963 (9th Cir. 2001) ("the presumption of receipt established by the mailbox rule [is applied] precisely to avoid the type of swearing contest in which the parties are presently involved"). The I.R.S. might very well defeat the factual presumption created by the Sorrentinos' evidence by successfully attacking the couple's credibility or demonstrating effective procedures within the I.R.S. that prevent loss of returns. At this stage in the litigation, however, we have only the sworn testimony of the Sorrentinos that they both signed the return in early March, Mr. Sorrentino's sworn testimony that he promptly mailed the return after signing it, a copy of that return, and the I.R.S.'s allegation of non-receipt. The mailbox rule's presumption of receipt steps in to create a genuine issue of material

fact, and the majority's dismissal of the case at this juncture is improper.

For the foregoing reasons, I respectfully dissent.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROLLY J. SORRENTINO; JOANN M. SORRENTINO, husband & wife,

Plaintiffs-Appellees,

v.

INTERNAL REVENUE SERVICE; UNITED STATES OF AMERICA,

Defendants-Appellants.

STEVEN G. SKLAVER,

Amicus Curiae.

Nos. 02-1114 & 02-1137
(D.C. No. 01-K-129)
(D. Colo.)

JUDGMENT

Filed September 14, 2004

Before **SEYMOUR, BALDOCK,** and **HARTZ,** Circuit Judges.

This case originated in the District of Colorado and was argued by counsel.

The judgment of that court is reversed. The case is remanded to the United States District Court for the

District of Colorado for further proceedings in accordance with the opinion of this court.

Entered for the Court
PATRICK FISHER, Clerk

by: /s/ Karen Phillips
Deputy Clerk

United States District Court,
D. Colorado.
Rolly J. SORRENTINO and Joann M. Sorrentino,
husband and wife, Plaintiffs,
v.
UNITED STATES of America, Defendant.
No. CIV.A. 01-K-129.

Oct. 25, 2001.

Rolly J. Sorrentino, Wheat Ridge, CO, pro se.

Joann M. Sorrentino, Wheat Ridge, CO, pro se.

August A. Imholtz, III, U.S. Dept. of Justice, Washington, DC, for I.R.S. and Jack Cheskaty.

MEMORANDUM OPINION AND ORDER

KANE, Senior District Judge.

Plaintiffs Rolly and Joann Sorrentino, appearing *pro se,* seek a refund of federal income taxes overpaid during the 1994 tax year in the amount of $8,551.00, plus interest and costs. Defendant United States concedes the Sorrentinos overpaid their 1994 federal income taxes in this amount. It nonetheless disputes their refund claim and seeks summary judgment on the ground that, as a matter of law, the Sorrentinos cannot prove they filed their valid refund claim with the IRS before the April 15, 1998 filing deadline. *See* 26 U.S.C. § 7422(a) (suit for tax refund can only be maintained if the claim for refund was "duly filed" with IRS).

Factual Background

The Sorrentinos claimed the refund at issue in this case in their 1994 joint tax return. The filing deadline for this refund claim was April 15, 1998. The United States does not dispute Mr. Sorrentino's deposition testimony that he placed the original of the 1994 tax return, properly addressed and postage prepaid, in a mail drop at the United States Post Office in Wheat Ridge, Colorado, in early March, 1998, shortly after the March 1, 1998, signature date shown on the return and more than six weeks before the April 15, 1998 filing deadline.[1] Mr. Sorrentino testified he did not mail the return by certified or registered mail.

Mr. Sorrentino further testified that when he had not received the refund due under the return by September, 1998, he contacted the IRS via its toll-free information line to check on its status. He testified he was told at that time the IRS did not have a record of receiving the return and was directed to send it a copy of the return. Mr. Sorrentino testified he complied with this request. The IRS has not presented any evidence disputing this account.

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[1] Mr. Sorrentino testified in his deposition that he did not file the 1994 return earlier because he was waiting for the IRS to respond to his request for an "INPOL report" or transcript of all of his income as recorded by the IRS for the 1994 tax year, which he intended to use to determine whether certain income he had received should be reported in the 1994 or 1995 tax year. The IRS sent him an incomplete report on August, 1995. After being absent from his home on a work project for several years, Mr. Sorrentino submitted a second request to the IRS for a 1994 INPOL report in September, 1997. When he did not receive the requested report, and with the April 15, 1998 deadline approaching, Mr. Sorrentino testified he proceeded to complete and mail the 1994 return without the benefit of the INPOL report.

It is undisputed the IRS received a photocopy of the Sorrentinos' 1994 return, dated March 1, 1998, on October 2, 1998. The IRS has no record of receipt of the original return Mr. Sorrentino testified he mailed in early March, 1998. As a result, the IRS treated the copy of the tax return it received on October 2, 1998 as the Sorrentinos' original return and disallowed the refund it claimed on the ground that the claim was filed after the April 15, 1998 filing deadline.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard, I view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir.1999). The United States, as the moving party, has the initial burden of showing the absence of a genuine issue of material fact. *Id.* A genuine issue of material fact exists if a rational juror could decide the disputed allegations in the non-movant's favor based on the evidence presented and the disputed fact might affect the outcome of the suit under the governing law. *See Schwartz v. Brotherhood of Maintenance of Way Employees*, 264 F.3d 1181 (10th Cir.2001).

Discussion

The premise underlying the United States' motion is that, as a matter of law, a refund claim is only "filed" with the IRS: (1) on the date it was physically delivered to the appropriate IRS office, which the United States contends requires proof of such physical delivery; or (2) on the date of mailing, which the United States argues may only be proven by production of the postmarked envelope that transmitted the refund claim or a postmarked receipt for sending the claim via certified or registered mail. Because the Sorrentinos cannot produce physical evidence of delivery, the postmarked envelope or a postmarked certified or registered mail receipt, the United States asserts it is entitled to summary judgment.

The obvious flaw in the United States' argument is its unjustified limitation of the evidence a taxpayer may submit to demonstrate it has filed a document with the IRS. The Tenth Circuit and other courts have long recognized that a taxpayer may rely on the common law mailbox rule to prove that a document was physically delivered to and therefore filed with the IRS. *Crude Oil Corp. of America v. Commissioner,* 161 F.2d 809, 810 (10th Cir.1947); *Anderson v. United States,* 966 F.2d 487, 491 (9th Cir.1992); *Arkansas Motor Coaches v. Commissioner,* 198 F.2d 189, 191 (8th Cir.1952). Under this rule, "[w]hen mail matter is properly addressed and deposited in the United States mails, with postage duly prepaid thereon, there is a rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail. . . . Proof of due mailing is prima facie evidence of receipt. It follows that the proof of regular mailing, in time to reach the [IRS], in due course of mail, within the statutory filing period, [is] sufficient to support a finding that

the return was timely filed." *Crude Oil Corp.*, 161 F.2d at 810. To prove "due mailing" under the rule, the taxpayer may present "'evidence of actual mailing such as an affidavit from the employee who mailed the [return] or present proof of procedures followed in the regular course of operations which give rise to a strong inference that the [return] was properly addressed and mailed.'" *Reading Ventures, Ltd. v. United States,* 987 F.Supp. 1315, 1318 (D.Colo.1997) (quoting *Godfrey v. United States,* 997 F.2d 335, 338 (7th Cir.1993)); *see Anderson,* 966 F.2d at 492 (affirming district court's finding that tax return was delivered to IRS based on, among other things, taxpayer's testimony that she mailed return).

The United States argues the common law mailbox rule is not applicable in this and other cases involving documents filed pursuant to federal statute because the Supreme Court rejected the mailbox rule when it held in *United States v. Lombardo,* 241 U.S. 73, 36 S.Ct. 508, 60 L.Ed. 897 (1916), that "file" as used in a federal statute means the documents are delivered to the relevant government agency. *Id.* at 76, 36 S.Ct. 508 (interpreting a filing requirement imposed by a criminal statute). The common law mailbox rule is not even mentioned in this decision, however, and the Supreme Court itself has dismissed out of hand the notion that it rejected the mailbox rule in *Lombardo. See Houston v. Lack,* 487 U.S. 266, 274 n. 2, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). Because the common law mailbox rule only provides taxpayers and others with an additional means of proving physical delivery to a government office, it is also consistent with the Court's equation of filing with physical

delivery in *Lombardo*.[2] This is demonstrated by the continued application of the rule by the Tenth Circuit and others in cases involving federal filings in the eighty-five years since *Lombardo*. *See, e.g., Carroll v. Commissioner,* 71 F.3d 1228, 1230 (6th Cir.1995); *Anderson,* 966 F.2d at 491-92; *Crude Oil Corp.,* 161 F.2d at 810.

The United States also contends the common law mailbox rule is not available in this and other cases involving documents filed with the IRS because it was supplanted in 1954 by the "statutory mailbox rule" stated in § 7502 of the Internal Revenue Code. 26 U.S.C. § 7502. This statutory rule, which is more properly titled the "postmark rule," deems the date of delivery and hence date of filing to be the date on which a mailed document was postmarked if the document was: (1) properly placed in the U.S. mail; (2) postmarked on or before the filing deadline; and (2) [sic] delivered to the IRS after the deadline. *Id.* § 7502(a), (b). The statute further provides that a postmarked receipt for sending the document by registered or certified mail constitutes prima facie evidence that the document was postmarked and delivered. *Id.* § 7502(c).

There is a split in the circuits regarding what effect, if any, § 7502 has on application of the common law mailbox rule against the IRS. *See Carroll,* 71 F.3d at 1228-1232

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[2] The common law mailbox rule articulated by the Tenth Circuit and other courts does *not* stand for the proposition that a document is filed when mailed, but rather that there is a rebuttable presumption of physical delivery and thus filing within the ordinary course of the mail upon proof of mailing. *See Carroll v. Commissioner,* 71 F.3d 1228, 1230 (6th Cir.1995); *In re Nimz Transportation, Inc.,* 505 F.2d 177, 179 (7th Cir.1974); *Crude Oil Corp.,* 161 F.2d at 810.

(summarizing cases).[3] I am persuaded by the reasoning of the Eighth and Ninth Circuits and a prior decision in this court that § 7502 does not preempt or modify the common law rule that proof that a document was properly mailed to the IRS creates a rebuttable presumption the document was delivered to the IRS and thereby filed in the ordinary course of business. *See Anderson,* 966 F.2d at 490-91; *Wood v. Commissioner,* 909 F.2d 1155, 1158-59 (8th Cir.1990); *Reading Ventures, Ltd. v. United States,* 987 F.Supp. at 1318-19. There is simply no indication Congress intended otherwise when it enacted § 7502.

Applying the common law mailbox rule to this case, the Sorrentinos are entitled to a rebuttable presumption that they timely filed their refund claim for the 1994 tax year upon proof they properly mailed their 1994 tax return in time for it to be delivered to the IRS before the April 15, 1998 deadline. Mr. Sorrentino has testified he properly mailed the 1994 return in early March, 1998, which provided more than ample time for the return to reach the IRS in the ordinary course of the mail before the April 15 deadline. *See Carroll,* 71 F.3d at 1230 (presumption is that "addressee would receive the material after a normal interval – two or three days, *e.g.,* under current Postal Service norms"). Mr. Sorrentino's account of an early March mailing is supported by the March 1 signature date on the photocopied return the IRS acknowledges receiving and by Mr. Sorrentino's testimony that he followed up on

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[3] *See also* Kimberly C. Metzger, *Interpretation of the Section 7502 Timely-Mailing, Timely-Filing Requirements: Carroll v. Commissioner and the Liberal/Conservative Interpretation Dilemma,* U. Tol. L.Rev. 767 (1997); Kenneth H. Ryesky, *Analysis of the Split Authority on Proof of a Postmark Under Internal Revenue Code § 7502,* 21 U. Dayton L.Rev. 379 (1996).

the status of the return before the October 2, 1998 filing date asserted by the IRS. This evidence is sufficient for a reasonable juror to find that the Sorrentinos properly mailed their return in time for it to be timely received and filed by the IRS. Accordingly, under the proper legal standard, the Sorrentinos are entitled to a rebuttable presumption that their 1994 tax return was timely filed with the IRS.

The United States did not present any evidence rebutting this factual presumption in connection with its motion for summary judgment. As a result, a rational juror could decide the sole material issue in this action, whether the Sorrentinos timely filed their refund claim, in the Sorrentinos' favor based on the evidence presented.

There really is not a genuine dispute of material fact in this action, where there is sworn testimony on one side countered only by an unacceptable presumption by the United States on the other. There is no basis in law or in fact permitting entry of summary judgment for the United States.

The United States' Motion for Summary Judgment is DENIED.

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199 F.Supp.2d 1068

United States District Court,

D. Colorado.

Rolly J. SORRENTINO and Joann M. Sorrentino, husband and wife, Plaintiffs,

v.

UNITED STATES of America, Defendant.

No. CIV.A.01-K-129.

Jan. 8, 2002.

Rolly J. Sorrentino, Wheat Ridge, CO, Pro se.

Joann M. Sorrentino, Wheat Ridge, CO, Pro se.

August A. Imholtz, III, U.S. Department of Justice Tax Division, Washington, DC, for Defendant.

MEMORANDUM OPINION AND ORDER

KANE, Senior District Judge.

Plaintiffs Rolly and Joann Sorrentino, appearing *pro se*, seek a refund of federal income taxes overpaid during the 1994 tax year in the amount of $8551.00, plus interest, costs and attorney fees. Defendant United States concedes the Sorrentinos overpaid their 1994 federal income taxes in this amount, but has refused to refund their overpayment on the ground the Sorrentinos cannot prove they filed their refund claim by the applicable deadline. On October 25, 2001, I denied the United States' motion for summary judgment. *Sorrentino v. United States* (*Sorrentino I*), 171 F.Supp.2d 1150 (D.Colo.2001). For the reasons

set forth below, I grant the Sorrentinos' subsequent motion for summary judgment.[1]

Factual Background

The following facts are undisputed unless otherwise stated.

The deadline for the Sorrentinos to claim a refund for federal taxes overpaid in the 1994 tax year was April 15, 1998. In March, 1995, Mr. Sorrentino, an engineer, prepared a draft of his and his wife's joint federal tax return for 1994, which included a refund claim. He submitted a copy of this draft return to the financial aid office at their daughter's university in August, 1995, but did not finalize the return at this time because he was waiting for the Internal Revenue Service (IRS) to respond to his request for an "INPOL report" or transcript of all of his income as recorded by the IRS for the 1994 tax year. Mr. Sorrentino intended to use this report, which he had requested and received for previous tax years, to determine whether certain income he had received should be reported in the 1994 or 1995 tax year.

Mr. Sorrentino received an incomplete INPOL report from the IRS in September, 1995. After being absent from his home on a work project for nearly two years, he submitted a second request to the IRS for a 1994 INPOL report in September, 1997. When he did not receive the requested report, and with the April 15, 1998 filing deadline

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[1] I granted the Sorrentinos' motion from the bench on November 26, 2001, and informed the parties then that this written decision would follow.

approaching, Mr. Sorrentino completed the 1994 return without the benefit of the INPOL report.

Mr. Sorrentino completed the 1994 joint tax return by March 1, 1998. On this date, both he and his wife signed and dated the return. On or about March 3, 1998, more than six weeks before the April 15, 1998 filing deadline, Mr. Sorrentino testified he personally placed the original of the 1994 tax return, postage prepaid and properly addressed to the IRS's processing facility in Austin, Texas, in a mail drop at the United States Post Office in Wheat Ridge, Colorado. He did not mail the return by certified or registered mail. Mr. Sorrentino retained a copy of the original return for his and his wife's records.

In September, 1998, Mr. Sorrentino contacted the IRS via its toll-free information line to ask why he had not received the refund claimed in his March 1, 1998 return. The IRS representative informed him the IRS did not have a record of receiving the return and directed him to send the agency a copy of the return.

The IRS received a photocopy of the Sorrentinos' 1994 return, dated March 1, 1998, on October 2, 1998. The IRS has no record of receiving the original return Mr. Sorrentino mailed to it in early March, 1998. As a result, the IRS treated the copy of the tax return it received on October 2, 1998 as the Sorrentinos' original return and, on January 28, 1999, disallowed the refund it claimed on the ground it was filed after the April 15, 1998 filing deadline. The IRS denied the Sorrentinos' appeal of this decision by letter dated May 11, 1999. The Sorrentinos' timely filed this action on January 23, 2001.

Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard. I view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party. *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir.1999). The Sorrentinos, as the moving party, have the initial burden of showing the absence of a genuine issue of material fact and that they are entitled to judgment as a matter of law. *Id.* If the Sorrentinos carry this burden, then the burden shifts to the United States to "set forth specific facts showing there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact exists if a rational juror could decide the disputed allegations in the non-movant's favor based on the evidence presented and the disputed fact might affect the outcome of the suit under the governing law. *See Schwartz v. Bhd. of Maint. of Way Employees*, 264 F.3d 1181, 1183 (10th Cir.2001).

Analysis

I. The Sorrentinos' Motion for Summary Judgment

The parties agree that if the Sorrentinos' 1994 tax return was delivered to the IRS on or before April 15, 1998, or if the return was placed in the mail and post-marked on or before this date, then their refund claim was

timely filed and the United States is required to refund the $8551.00 in federal taxes the Sorrentinos overpaid for the 1994 tax year.[2] The former scenario is based on the general rule that filing occurs upon physical delivery to the IRS, *see Sorrentino I*, 171 F.Supp.2d at 1153, and the latter on the statutory postmark rule, stated at 26 U.S.C. § 7502, which effectively extends the filing deadline by providing that in certain circumstances a document mailed to the IRS is deemed delivered and hence filed on the date it is postmarked, rather than on the date it is physically delivered to the IRS.

In *Sorrentino I*, I considered the United States' motion for summary judgment, in which it argued the Sorrentinos could not prove timely filing under either scenario because they admitted mailing their 1994 return, rather than physically delivering it to the out-of-state IRS processing facility, and further admitted they had not mailed it certified or registered mail as, the United States argued, was required to invoke the statutory postmark rule. I denied the United States' motion upon determining that the Sorrentinos could, in fact, prove physical delivery of their 1994 tax return to the IRS pursuant to the common law mailbox rule. *See* 171 F.Supp.2d at 1152-54; *see also Schikore v. BankAm. Supplemental Ret. Plan*, 269 F.3d

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[2] The parties' agreement on the April 15, 1998 filing deadline is based on Internal Revenue Code provisions limiting refund claims to claims for taxes paid within the previous three years (plus any filing extensions), *see* 26 U.S.C. § 6511(b)(2)(A), and deeming prepaid income taxes paid on the April 15th following the relevant tax year, *see id.* § 6513(b)(1). *See generally Weisbart v. United States Dep't of Treasury*, 222 F.3d 93, 94-96 (2d Cir.2000) (discussing filing deadlines for refund claims). The IRS considers a tax return that reflects an overpayment to be a refund claim. *See* 26 C.F.R. § 301.6402-3(a)(5).

956, 961 (9th Cir.2001) (common law mailbox rule "is a tool for determining, in the face of conflicting evidence, whether or not receipt has actually been accomplished"). As a result, it was not necessary to reach the United States' argument that the Sorrentinos could not prove timely filing under the separate statutory postmark rule.

As stated by the Tenth Circuit, the common law mailbox rule provides "[w]hen mail matter is properly addressed and deposited in the United States mails, with postage duly prepaid thereon, there is a rebuttable presumption of fact that it was received by the addressee in the ordinary course of the mail. . . . Proof of due mailing is prima facie evidence of receipt. It follows that the proof of regular mailing, in time to reach the [IRS], in the due course of mail, within the statutory filing period, [is] sufficient to support a finding that the return was timely filed." *Crude Oil Corp. v. Comm'r of Internal Revenue*, 161 F.2d 809, 810 (10th Cir.1947); *see, e.g., Hagner v. United States*, 285 U.S. 427, 430, 52 S.Ct. 417, 76 L.Ed. 861 (1932); *Witt v. Roadway Express*, 136 F.3d 1424, 1429-30 (10th Cir.1998). This rule applies to mailings by taxpayers to the IRS. *See, e.g., Crude Oil Corp.*, 161 F.2d at 810; *Lewis v. United States*, 144 F.3d 1220, 1222 (9th Cir.1998); *Arkansas Motor Coaches, Ltd. v. Comm'r of Internal Revenue*, 198 F.2d 189, 191 (8th Cir.1952).

In *Sorrentino I*, I determined that the evidence then in the record was sufficient for a reasonable juror to find that the Sorrentinos properly mailed their return in time for it to be delivered to the IRS weeks before the April 15, 1998 filing deadline. As a result, I found that the Sorrentinos were entitled, under the common law mailbox rule, to a rebuttable presumption that their 1994 tax return was timely filed with the IRS. As the United States failed to

submit any evidence in support of its motion rebutting the presumption of delivery, I ruled it had failed to prove the absence of a genuine issue of fact regarding the timely filing of the Sorrentinos' 1994 return and refund claim and therefore denied its motion.

My holding in *Sorrentino I* that the Sorrentinos had presented sufficient evidence of mailing to invoke the common law mailbox rule *a fortiori* means they have submitted sufficient evidence of mailing and, under the rebuttable presumption, delivery and timely filing, to carry their initial burden of demonstrating the absence of any genuine issues of fact in connection with their motion for summary judgment. In order to avoid summary judgment based on the Sorrentinos' motion, therefore, the United States was required to set forth specific facts showing a genuine issue of fact as to either the fact of mailing or the presumed fact of delivery. *See* Fed.R.Civ.P. 56(e).

A. Fact of Mailing

The United States did not present any evidence disputing that Mr. Sorrentino properly mailed the 1994 tax return to the IRS on or about March 3, 1998. Instead, it argues that Mr. Sorrentino's sworn statements of proper mailing, in deposition and affidavit, are insufficient as a matter of law to establish the fact of mailing because his statements are uncorroborated and self-serving.

The United States' argument lacks merit for any number of reasons. First, it ignores the general rule that an unopposed affidavit or other sworn statement needs no corroboration to establish an undisputed fact on summary judgment. *See* Fed.R.Civ.P. 56(e); *Walter v. Fiorenzo*, 840

F.2d 427, 434-35 (7th Cir.1988) ("motion for summary judgment cannot be defeated merely by an opposing party's incantation of lack of credibility over a movant's supporting affidavit"). Second, it disregards the law of the case and other applicable law regarding evidence that will establish the fact of mailing under the mailbox rule. In *Sorrentino I*, I held that Mr. Sorrentino's testimony, together with the undisputed testimonial and record evidence that the Sorrentinos both executed their return on March 1, 1998, and that Mr. Sorrentino contacted the IRS to check on the status of the return before the October 2, 1998 filing date asserted by the IRS, was sufficient to establish the fact of mailing in early March, 1998. 171 F.Supp.2d at 1154. This holding was based on a long line of cases, not addressed by the United States, stating that direct evidence of mailing, such as an affidavit from the person who mailed the document, or even circumstantial evidence, such as proof of customary mailing practices in the sender's office, is sufficient evidence of actual mailing to invoke the mailbox rule and trigger its rebuttable presumption of delivery. *See, e.g., Schikore*, 269 F.3d at 964 ("a sworn statement is credible evidence of mailing for purposes of the mailbox rule"); *Godfrey v. United States*, 997 F.2d 335, 338 (7th Cir.1993) (sworn statement of individual who personally mailed the document is sufficient); *cf. Davis v. United States Postal Service*, 142 F.3d 1334, 1340 (10th Cir.1998) (refusing to apply mailbox rule because plaintiff did not offer an affidavit by the sender as to mailing or evidence regarding customary mailing practices in the sender's office that would permit an inference of mailing).

None of the authority offered by the United States in support of its argument is persuasive or even on point, as

virtually all of it concerns the evidence necessary to invoke the statutory postmark rule, rather than the common law mailbox rule. As I made clear in *Sorrentino I*, this case turns on application of the common law rule, not the statutory postmark rule. The two rules are distinct, *see Lewis*, 144 F.3d at 1224-25 (Ret. Justice White, sitting by designation, dissenting), and that sworn statements of mailing may not be sufficient to establish a postmark under the statutory rule is irrelevant to determining the evidence sufficient to establish mailing under the common law rule.[3]

The only two cases cited by the United States that even touch on application of the common law mailbox rule are *Estate of Wood v. Commissioner*, 909 F.2d 1155 (8th Cir.1990), and *Anderson v. United States*, 966 F.2d 487 (9th Cir.1992). In *Estate of Wood*, one of the questions presented was whether the statutory postmark rule was available to a taxpayer when the IRS claimed it had not received the document mailed to it. *See* 909 F.2d at 1158-62 (interpreting 26 U.S.C. § 7502(a)(1)). The Eighth Circuit invoked the common law presumption of delivery to hold that where the taxpayer had presented sufficient evidence that the document had been postmarked as required by the statute, the common law presumption of delivery could be invoked to satisfy section 7502's requirement of delivery. *See* 909 F.2d at 1161-62. Nowhere in the decision does the court consider the evidence necessary

[3] As I do not decide this case on the basis of the statutory postmark rule, I do not express any opinion on the United States' contention that uncorroborated taxpayer statements of mailing are insufficient to prove the date of postmark under 26 U.S.C. § 7502, other than to note that there is a variety of judicial opinion on what evidence may be used to prove the date of postmark under this statute.

to prove mailing outside of the context of the statutory postmark rule.

The Ninth Circuit's decision in *Anderson* also does not support the United States' position that a taxpayer's sworn statements cannot prove mailing under the common law rule. In that case, the court held a taxpayer could prove mailing and timely delivery to the IRS pursuant to the common law mailbox rule, and was not limited by the evidentiary limitations the United States claimed were inherent in the statutory rule. *See* 966 F.2d at 489-492. The taxpayer's evidence of mailing in that case happened to be her own testimony that she personally mailed her refund claim and watched a postal official postmark the envelope on a certain date and a friend's testimony that she had watched the taxpayer enter the post office with the envelope and return without it. The Ninth Circuit has previously rebuked the United States for "[p]aying lipservice" to *Anderson* by reading it as applying only where such evidence is presented, *see Lewis*, 144 F.3d at 1223 (United States "unreasonable to read *Anderson* in such a wooden way"), and has expressly stated that "a sworn statement is credible evidence of mailing for purposes of the mailbox rule." *Schikore*, 269 F.3d at 964 (citing *Lewis*, 144 F.3d at 1223).

The United States' contention that a sender's sworn statements of mailing is insufficient as a matter of law to prove mailing also rings hollow given its advancement of a contrary position in another tax case recently before this court. In *Reading Ventures, Ltd. v. United States*, 987 F.Supp. 1315 (D.Colo.1997), the exact same issue, whether the taxpayer had presented sufficient evidence of mailing to trigger the rebuttable presumption of delivery under the common law mailbox rule, was presented on summary

judgment. The taxpayer's evidence of mailing consisted of deposition testimony of its accountant that he had prepared the subject tax form for mailing and placed it in an office receptacle where someone in the office would have picked it up and mailed it in the regular course of business. *Id.* at 1320. The United States argued the taxpayer had failed to establish mailing because it had not produced testimony that a person actually mailed the outgoing documents. *Id.* Obviously, if such evidence would have been sufficient in that case to establish mailing for purposes of the common law mailbox rule, then it is sufficient here.

At oral argument, the United States further complained that allowing taxpayers to prove mailing through sworn but uncorroborated statements "opens the floodgate for fraud and abuse of process" because it is impossible for the government to refute such statements. Tr. at 6. I disagree. In this as in most cases, the United States had an opportunity to test the taxpayer's account of mailing in deposition and to otherwise investigate the facts he related regarding the preparation and mailing of the subject tax return. Any inconsistencies in his account or other relevant evidence, such as a suspicious pattern of previous tax filings, could have been used to demonstrate a genuine issue as to the fact of mailing or at least as to Mr. Sorrentino's credibility. The United States, however, failed to produce or even allege any specific facts putting Mr. Sorrentino's credibility in issue or otherwise disputing that Mr. Sorrentino properly mailed the 1994 return in early March, 1998. Under these circumstances, the United States did not carry its burden of demonstrating a genuine issue for trial on the fact of when the Sorrentinos mailed their 1994 federal tax return. *See, e.g., Liberty Lobby*, 477

U.S. at 256-57, 106 S.Ct. 2505 (party opposing summary judgment must produce specific facts showing genuine issue of fact and may not rely on possibility jury will disbelieve testimony); *Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1312 (10th Cir.2000) (alleged issue of witness' credibility did not preclude summary judgment because non-moving party failed to allege any specific deficiency in witness' account); 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil § 2726 at 445 (3d ed.1998) (general rule is specific facts must be produced to put credibility in issue so as to preclude summary judgment). Accordingly, the Sorrentinos' evidence of mailing on or about March 3, 1998 is undisputed and is therefore established for purposes of their motion for summary judgment.

B. Presumed Fact of Delivery

As stated earlier, proof of proper mailing creates a rebuttable presumption the mailed document was received by the addressee in the ordinary course of the mail. In practical terms, this translates to a rebuttable presumption that the mailed document was delivered no later than five days after it was mailed. *See Lozano v. Ashcroft*, 258 F.3d 1160, 1165 (10th Cir.2001) (presumption of delivery in 3-5 days); *Carroll v. Comm'r of Internal Revenue*, 71 F.3d 1228, 1230 (6th Cir.1995)(delivery presumed in 2-3 days). Under the facts of this case, therefore, the Sorrentinos' proof that they mailed their 1994 tax return to the IRS on or about March 3, 1998 creates a rebuttable presumption that the return was delivered to and therefore filed with the IRS no later than March 8, 1998, more than five weeks before the April 15, 1998 filing deadline.

To rebut this presumption, and thereby create a genuine issue for trial on the fact of delivery, the United States was required to produce evidence that would support a finding that the IRS did not receive the Sorrentinos' return. *See Nunley v. City of Los Angeles*, 52 F.3d 792, 796 (9th Cir.1995); *see Witt*, 136 F.3d at 1430 ("evidence denying receipt creates a credibility issue that must be resolved by the trier of fact.").[4] The evidence offered by the United States on this issue consisted solely of copies of: (1) a Certificate of Official Record annexing Form 4340, a "Certificate of Assessment, Payments and Other Specified Matters," for the Sorrentinos' 1994 tax year; (2) a certification from an IRS official that the Certificate is a true and complete transcript of the matters it addresses as they appear in the official records of the IRS; and (3) a declaration by United States' counsel that the referenced Certificate of Assessment "reflects the fact that the plaintiffs' 1994 Form 1040 tax return was received by the IRS on October 2, 1998."

The Certificate of Assessment indeed states the Sorrentinos' 1994 tax return was filed October 2, 1998. In its motion for summary judgment, however, the United States admitted the return referenced in these documents and received on October 2, 1998 was a photocopy of the

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[4] Under the "bursting bubble" approach to presumption set forth in Federal Rule of Evidence 301, once the presumption is rebutted, it disappears from the case, leaving the finder of fact to weigh the evidence and make a factual determination concerning receipt. *Nunley*, 52 F.3d at 796; *In re Yoder*, 758 F.2d 1114, 1119-20 (6th Cir.1985); Fed.R.Evid. 301. However, "[e]ven after the 'bubble' of presumption has 'burst,' the factual question of receipt remains and may be decided in favor of receipt by a fact finder who may choose to draw inferences of receipt from the evidence of mailing, in spite of contrary evidence." *Nunley*, 52 F.3d at 796.

Sorrentinos' March 1, 1998 return, rather than the original return. *See* U.S. Memo. in Support of U.S. Mot. for Summ. J. at 4, ¶ 14. Thus, the United States' evidence of non-delivery is that the IRS has no record of having received the original 1994 tax return mailed by Mr. Sorrentino on or about March 3, 1998.

It is well established that evidence "[m]erely stating that the document isn't in the addressee's files or records . . . is insufficient to rebut the presumption of receipt" that arises under the common law mailbox rule. *Huizar v. Carey*, 273 F.3d 1220, 1223 n. 3 (9th Cir.2001); *see, e.g., Schikore*, 269 F.3d at 964 nn. 7, 8 (party's statement that mailed form is not presently contained in its files is insufficient to constitute the requisite "specific factual denial of receipt"); *Jones v. United States*, 226 F.2d 24, 27 (9th Cir.1955) ("The showing that a search of the pertinent files in the [addressee's] office revealed no record of the [mailed document] having been filed is a purely negative circumstance, insufficient . . . to rebut the presumption of delivery."); *In re Nimz Transp., Inc.*, 505 F.2d 177, 179 (7th Cir.1974) (same); 31A C.J.S. § 156 nn. 31, 32 (1996 & Supp.2001) (collecting cases). Such evidence will rebut the presumption, however, and create a genuine issue for trial concerning receipt of the mailed document, if the addressee also produces evidence:

> describ[ing] in detail [the addressee's] procedures for receiving, sorting and distributing mail, [showing] that these procedures were properly followed at the time when the document in question might conceivably have been delivered by the postal service, [providing] evidence that [the addressee] has conducted a thorough search for the document at the addressee's physical facility, and [establishing] that had the document been

> received around the time the [party] asserted it was mailed, it would presently be at the location searched by the [addressee].

Schikore, 269 F.3d at 964; *see, e.g., Legille v. Dann*, 544 F.2d at 1, 7-8 (D.C.Cir.1976) (Patent Office rebutted presumption of delivery through evidence detailing mail receipt procedures during time in question); *Crude Oil Corp.*, 161 F.2d at 810 (issue of fact as to delivery created by IRS's evidence describing "the careful method of handling mail received by the Collector's office . . . from which it could have been inferred that the [mailed documents] were not received through the mail by the Collector's office."); *but see Charlson Realty Co. v. United States*, 181 Ct.Cl. 262, 384 F.2d 434, 443-45 (1967) (presumption of delivery was not rebutted by production of evidence of customary mail receipt and recording procedures).[5]

The United States did not submit any testimony or other evidence regarding the IRS's procedures for receiving mail and recording the receipt of documents received at the IRS's Austin facility in early March, 1998, when the Sorrentinos' return is presumed to have been delivered

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[5] It is also well established that direct testimony or an affidavit by the individual to whom the document was addressed specifically denying that he or she received the document is generally sufficient to rebut the presumption and therefore create a triable issue of fact. *See, e.g., Lozano*, 258 F.3d at 1166; *Witt*, 136 F.3d at 1430. Where the addressee is an organization, however, the presumption of delivery is not overcome by testimony of an individual that he did not receive the mailed document unless it is also shown that no other employees who might have received the organization's mail in the relevant period received the document. *See, e.g., Merchs.' & Mfrs.' Ass'n v. First Nat'l Bank*, 40 Ariz. 531, 14 P.2d 717, 719-20 (1932) (cited with approval in *Crude Oil Corp.*, 161 F.2d at 810); 29 Am.Jur.2d *Evidence* § 266 & nn. 45, 46 (1994 & Supp.2001) (collecting cases).

there. Neither did the United States present any evidence that it had conducted a thorough search for the Sorrentinos' missing return at appropriate locations. Accordingly, pursuant to the authority cited above, the United States failed to produce evidence rebutting the presumption that the Sorrentinos' return was delivered to it and thus filed on or about March 8, 1998.[6] As a result, there is no genuine issue of fact regarding the timely filing of the Sorrentinos' 1994 tax return, and the Sorrentinos are entitled to summary judgment on their refund claim.

II. Interest, Costs, Attorney Fees and Sanctions

In addition to a refund of $8551.00 in federal taxes overpaid for the 1994 tax year, the Sorrentinos seek pre- and post-judgment interest on this amount, court costs, other litigation costs and attorney fees. The Sorrentinos also request that sanctions and/or punitive damages be awarded against the United States.

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[6] The United States cites *Reading Ventures, Ltd. v. United States*, 987 F.Supp. 1315 (D.Colo.1997), as establishing that a Certificate of Assessment showing no record of receipt before the filing deadline is sufficient to rebut the presumption of delivery and create a triable issue of fact as to timely filing. In that case, however, the United States also submitted a declaration from an IRS official regarding the Certificate of Assessment and other evidence in the record regarding non-receipt of the taxpayer's mailed document. *See id.* at 1321. To the extent, if any, that this declaration did not include evidence as to the IRS's mail handling and record-keeping procedures and its search for the missing document, as detailed above, I disagree with the court's decision that the presumption of delivery is rebutted by the lack of a record of receipt. I further note that the Ninth Circuit, author of the *Anderson* decision relied upon in *Reading Ventures*, has since confirmed that more than a record of non-receipt is required to rebut the presumption of delivery. *See, e.g., Schikore*, 269 F.3d at 964 nn. 7, 8.

A. Interest

The Sorrentinos are entitled to pre- and post-judgment interest on the amount of their overpayment for 1994 pursuant to 26 U.S.C. § 6611(a) and 28 U.S.C. § 2411. Interest is due under these provisions "from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue." 28 U.S.C. § 2411. The rate of interest is determined pursuant to 26 U.S.C. § 6621(a)(1). The parties agree that the amount of interest due under these provision [sic] as of December 4, 2001 was $5922.68.

B. Litigation Costs and Attorney Fees

The Sorrentinos' request for an award of litigation costs and attorney fees is governed by section 7430 of the Internal Revenue Code.[7] It provides that the prevailing party in an action against the United States to obtain a tax refund may be awarded its "reasonable litigation costs," 26 U.S.C. § 7430(a), which includes reasonable fees "paid or incurred for the services of attorneys." *Id.* § 7430(c)(1).

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[7] This provision incorporates the requirements stated in the Equal Access to Justice Act (EAJA) for applying for an award of fees and costs. *See* 26 U.S.C. § 7430(c)(4)(A)(ii) (incorporating first sentence of 28 U.S.C. § 2412(d)(1)(B)). These include the jurisdictional requirement that an application for fees be filed within 30 days of final judgment. 28 U.S.C. § 2412(d)(1)(B). A litigant may also, as the Sorrentinos have done here, file an application for an award of fees and costs before entry of final judgment. *See Koch v. United States*, 47 F.3d 1015, 1021 (10th Cir.1995); *Myers v. Sullivan*, 916 F.2d 659, 669 (11th Cir.1990).

Individuals who represent themselves *pro se* may not recover attorney fees or other compensation for their time under this provision because they have not paid or incurred fees for these efforts. *See McCormack v. United States*, 891 F.2d 24, 25 (1st Cir.1989); *United States v. McPherson*, 840 F.2d 244, 245 (4th Cir.1988). Accordingly, the Sorrentinos are not entitled to the $2000.00 they seek for Mr. Sorrentino's time in prosecuting this action.

The Sorrentinos may recover the other costs and fees they seek if they are the "prevailing party" as defined by the statute.[8] *See* 26 U.S.C. § 7430(a). This requirement is met if: (1) the Sorrentinos substantially prevailed in this action with respect to the amount in controversy or the most significant issues presented *and* (2) the United States' position in this dispute was not "substantially justified." *Id.* § 7430(c)(4)(A), (B). A litigation position "can be justified even though it is not correct" and is deemed substantially justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 566 n. 2, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) (defining "substantially justified" in EAJA context); *Lewis*, 144 F.3d at 1222; *In re Rasbury*, 24 F.3d 159, 168 (11th Cir.1994).

There is no question the Sorrentinos substantially prevailed in this action. Although the issue is somewhat closer, I also conclude the United States' position in this dispute was not substantially justified and that the

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[8] The statute also bars recovery unless the prevailing party exhausted available administrative remedies before bringing suit. *Id.* § 7430(b)(1). There is no question the Sorrentinos exhausted their administrative remedies in this case.

Sorrentinos are therefore entitled to recover their reasonable litigation costs in this action.

One of the factors Congress directed I consider in determining whether the United States' position was substantially justified is whether the United States has lost in courts of appeal for other circuits on substantially similar issues. 26 U.S.C. § 7430(c)(4)(B)(iii). The threshold issue in this case was whether the common law mailbox rule is available to a taxpayer to prove timely delivery and filing of a mailed document to the IRS. The United States' position that this rule has not been applicable against the IRS since at least 1916 ignored contrary law in this and other circuits. *See Crude Oil Corp.*, 161 F.2d at 810; *Sorrentino I*, 171 F.Supp.2d at 1153 (discussing relevant authority). Its alternate argument, that the common law rule was completely supplanted by enactment of the statutory postmark rule, 26 U.S.C. § 7502, has been rejected in the Eighth and Ninth Circuits and by this court. *See, e.g., Lewis*, 144 F.3d at 1222; *Estate of Wood*, 909 F.2d at 1160; *Reading Ventures*, 987 F.Supp. at 1318-19.

Although two courts of appeal, the Second and Sixth Circuits, have accepted the United States' position that the statutory postmark rule is the exclusive means for a taxpayer to prove timely filing of a document through the mails, *see, e.g., Miller v. United States*, 784 F.2d 728, 731 (6th Cir.1986); *Deutsch v. Comm'r of Internal Revenue*, 599 F.2d 44, 46 (2d Cir.1979), this view has been criticized even in these jurisdictions. *See Carroll v. Comm'r of Internal Revenue*, 71 F.3d 1228 (6th Cir.1995). As the Sixth Circuit recognized in *Carroll*: "If the [taxpayers] had been residents of any state other than Tennessee, Kentucky, Ohio, Michigan, Connecticut, New York, or Vermont, the

Tax Court would have allowed them to invoke the [common law] presumption of delivery and would have decided this case in their favor. Because the [taxpayers] live in Tennessee, however, the presumption does not work for them." *Id.* at 1233.

The Sorrentinos live in Colorado, not a state in the Second or Sixth Circuits. Throughout this case, the United States has refused to acknowledge that the common law mailbox rule continues to be applied in courts outside of these circuits. It also had no justification to continue to argue and cite authority regarding the statutory postmark rule, and only the statutory postmark rule, even after my ruling in *Sorrentino I* that this case could and would be decided based on the distinct common law mailbox rule. The position that a taxpayer can only prove timely filing through the statutory postmark rule, and only then through presentation of the postmarked envelope or a registered or certified mail receipt, has been deemed so unreasonable that it is an abuse of discretion *not* to award fees and costs against the government. *See Lewis*, 144 F.3d at 1222-1224 (reversing district court for failing to award costs and fees under § 7430). For all of these reasons, I find the position of the United States in this action was not substantially justified and therefore hold that the Sorrentinos are entitled to recover their reasonable litigation costs in connection with this action.

The Sorrentinos have submitted a claim for $384.00 for filing, service, postage and copying costs, all of which are reasonable and recoverable under section 7430. *See, e.g.*, 26 U.S.C. § 7430(c)(1); *Miller v. Alamo*, 983 F.2d 856, 862 (8th Cir.1993). The Sorrentinos also claim $225.00 in attorney fees. Under the statute, fees incurred "for the services of attorneys in connection with the court proceeding" may only

be awarded at a rate of $125/hour unless the court determines that a special factor justifies a higher rate. *See* 26 U.S.C. § 7430(c)(1)(B)(iii). Accordingly, if the Sorrentinos wish to recover the claimed attorney fees, they must file an itemized statement from the attorney stating the actual time expended and the rate at which his or her fee was computed. *See id.*; *see also* 28 U.S.C. § 2412(d)(1)(B). If the attorney's rate is more than $125/hour, they must also submit a statement justifying the higher rate. *See* 26 U.S.C. § 7430(c)(1)(B)(iii).

C. Sanctions

Finally, the Sorrentinos request that I impose sanctions and/or punitive damages against the IRS because "a little investigation, a little common sense and exercise of good judgment on the part of defendant could have eliminated the need for litigation in this case." Pl.'s Statement of Claim at 2. While I heartily concur in this assessment, I deny their request as there is no basis for awarding sanctions or punitive damages in this action.

Conclusion

The United States acknowledged in oral argument that the IRS loses documents properly mailed to it by honest taxpayers, but maintains that any taxpayer who fails to transmit documents via certified or registered mail assumes this risk. For the reasons set forth above, this is not the law. Furthermore, it is difficult to believe as a practical matter that the United States truly wants its Postal Service and IRS employees to be consumed with processing the millions of certified and registered mail requests that would result if the IRS advertised the position it advanced in this action. In fact,

the IRS has for decades encouraged taxpayers to file tax documents through placement in the regular U.S. mail. *See, e.g., Jones*, 226 F.2d at 28. There is no basis in law or equity to require the taxpayer to bear the risk that such mailings are not properly recorded by the IRS. That some unscrupulous taxpayers might perjure themselves to obtain the benefit of the common law mailbox rule is no reason to penalize honest taxpayers who trust their government to handle mailed tax returns properly. The common law mailbox rule, with its *rebuttable* presumption of delivery, offers the United States ample opportunity to create a triable issue of fact that will allow the fact finder to make its own judgment on the taxpayer's credibility.

The Sorrentinos' Motion for Summary Judgment is GRANTED. Judgment shall be entered in the Sorrentinos' favor and against the United States. The United States shall pay the Sorrentinos pre- and post-judgment interest as provided in 26 U.S.C. § 6611(a) and § 2411, as well as the fees and costs set forth in Paragraphs 4 and 5 of Plaintiffs' December 6, 2001 Statement of Claim, Costs, Damages and Request for Relief. The Sorrentinos' request for an award of attorney fees, as set forth in Paragraph 6 of their Statement, is DENIED with leave to resubmit with the additional information set forth above. The Sorrentinos' requests to recover for Mr. Sorrentino's time in prosecuting this action, as stated in Paragraph 7 of Plaintiffs' Statement, and for sanctions or other relief as stated in Paragraph 8 of the Statement, are DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE JOHN L. KANE

Civil Action No. 01-K-129

ROLLY J. SORRENTINO and JOANN M. SORRENTINO,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

(Filed Jan. 9, 2002)

Pursuant to and in accordance with the Memorandum Opinion and Order entered on October 25, 2001, by Judge John L. Kane, which is incorporated herein by reference as if fully set forth, it is

ORDERED that Defendant United States of America's motion for summary judgment, filed October 11, 2001, is denied.

Pursuant to and in accordance with the Order entered on January 8, 2002, by Judge John L. Kane, which is incorporated herein by reference as if fully set forth, it is

ORDERED that the Sorrentino's Motion for Summary Judgment, filed November 2, 2001 is granted and judgment is entered in favor of the plaintiffs Rolly J. Sorrentino and Joann M. Sorrentino, and against the defendant, the United States of America in the amount of $8,551.00. The United States shall pay the Sorrentinos pre- and post-judgment

interest as provided in 26 U.S.C. § 6611(a) and § 2411, as well as the fees and costs in the amount of $344.00.

DATED at Denver, Colorado, this 9th day of January, 2002.

FOR THE COURT:

James R. Manspeaker, Clerk

By: /s/ Stephen P. Ehrlich
Stephen P. Ehrlich
Chief Deputy

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROLLY J. SORRENTINO; JOANN M. SORRENTINO, husband & wife, Plaintiffs-Appellees, v. INTERNAL REVENUE SERVICE; UNITED STATES OF AMERICA, Defendants-Appellants, ... STEVEN G. SKLAVER, Amicus Curiae.	Nos. 02-1114 & 02-1137

ORDER

(Filed January 14, 2005)

Before **SEYMOUR, BALDOCK,** and **HARTZ**, Circuit Judges.

The petition for rehearing filed by appellees and amicus curiae is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in

regular active service on the court requested that he could be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER,
Clerk of Court

by: /s/ Karen Phillips
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-K-0129

ROLLY J. SORRENTINO
and JOANN M. SORRENTINO,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

DEPOSITION OF ROLLY SORRENTINO
September 11, 2001

Deposition location:
455 Sherman Street
Suite 250
Denver, Colorado

* * *

[8] Q. Do you recognize the document labeled Government Exhibit A?

A. Yes, sir.

Q. What is it, sir?

A. This is a copy of our 1994 United States individual income tax return, Form 1040, and accompanying schedules.

Q. I'd like to direct your attention to the back of the first page, specifically the bottom of the page, and I'd like to ask you if that's your signature at the bottom.

A. Yes, sir, it is.

Q. When did you sign this document labeled Government Exhibit A?

A. March 1st, 1998.

Q. And was this document or an original thereof mailed to the Internal Revenue Service?

A. Yes, it was.

Q. And when was that?

A. Within a day or two of March 1st, 1998. It may well have been March 1st, 1998.

Q. So are you unsure of the exact date?

A. I'm unsure of the exact date that it was deposited in the mail. My guess, it would have [9] without a doubt been mailed within three to five days of March 1st, 1998, if it was not mailed on March 1st, 1998, but my recollection and awareness is that it was mailed immediately subsequent to the signature, and the reason I say that is the signature is affixed to the final copy of this 1040 form after all the other information is filled out, including the accompanying schedules.

Q. Your 1994 form 1040 income tax return, was it you who mailed it?

A. Yes, I'm the one that mailed it.

Q. And how did you mail your 1994 return?

A. My recollection is I put it in a large envelope, rather than a small four and a half or three by five envelope, whatever it is, the five by nine envelopes, I used a

nine by twelve envelope, full-size envelope, that carried this form, and I addressed it to the United States Internal Revenue Service in Austin, Texas, and I put it in that full-size envelope and deposited it in the United States mail postage prepaid at the Wheat Ridge, Colorado, post office, which is very near our house.

Q. When you say you deposited the 1994 return in the mail at the post office, did you put it in a drop box outside or did you mail it inside?

[10] A. My recollection is that I took it inside and put it in the outgoing mail on the inside. I do not recall giving it to any postman or postal clerk at the counter. They have a mail drop inside the post office. They also have mail boxes outside. My recollection is I put it inside.

And one of the reasons I say that is that's my normal procedure also, I generally go in, it's very easy to go in and drop it in the mail inside because I sometimes go check our post office box, which is right there.

Q. So you didn't wait in line, just for clarity's sake, and mail it at the counter? You didn't have it weighed or anything like that?

A. My recollection is that I put stamps on the package, because I'm pretty aware of what it takes, and I took two first-class postage stamps, which may have totaled sixty some cents, and I mailed it there, but I do go in.

There's a scale in the Wheat Ridge post office in the outside area there that you can put your mail on and mail it – I mean weight it to see what it weighs so you can ensure that you have enough postage or sufficient postage on the envelope, and my recollection is that it required fifty-five cents of [11] postage and I had two stamps on it

which totaled more than fifty-five cents. That's my recollection. I am generally aware of what postage that return requires, because I've mailed them previously.

I also, for the record, did not mail the envelope certified or registered or return receipt requested, and the reason for that is that in my twenty or more years of history of mailing my return to the Internal Revenue Service, I had never done that. I had never deemed a need to do that, because I had never really received a problem or encountered a problem in doing that.

Q. And just so we're clear, did you ever see the envelope again after you deposited it in the outgoing mail slot inside the post office?

A. No, I never saw that envelope again.

Q. So is it fair to say that you didn't see anybody – any postal worker apply a postmark to it?

A. No, I didn't.

Q. Did you make copies of your 1994 income tax return before mailing it?

A. Yes, sir.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 01-K-0129

ROLLY J. SORRENTINO and
JOANN M. SORRENTINO, husband and wife,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL.,

Defendant,

AFFIDAVIT OF ROLLY J. SORRENTINO

State of Colorado }
}
County of Jefferson }

Comes now Rolly Sorrentino, affiant, being of sound mind and body and duly sworn on his oath, deposes and states as follows:

1. My name is Rolly James Sorrentino and I am over the age of eighteen years.

2. my address is 4175 Teller Street, Wheat Ridge, Colorado 80033.

3. I am a registered professional engineer by occupation and am not currently employed.

4. I am a party to this subject civil action as a plaintiff.

5. My wife, Joann Sorrentino, and I have filed our federal individual income tax returns jointly since we have been married in 1974.

6. I have been responsible for preparing and filing these returns over the years. I compile information and prepare our tax returns myself. We do not use a tax preparer or a tax preparation service.

7. My wife, Joann Sorrentino, has very little to do with preparation and filing of these tax returns However, she does provide me with certain specific documentation which I use in compiling necessary information to complete these returns. She also reviews and signs the completed tax returns.

8. Our federal individual income tax returns have always been filed by depositing the completed and signed 1040 forms, together with accompanying schedules and W2s in the regular US mail, postage prepaid. No special handling, certified mail, registered mail, priority mail, express mail, return receipt requested mail, or other similar service was ever previously used in filing these tax returns.

9. I, myself, personally prepared our joint 1994 federal individual income tax return (IRS form 1040) for the tax year ending December 31, 1994 (see plaintiffs' Exhibit A contained in Complaint).

10. I, myself, personally did mail, via US first class mail, postage prepaid, our completed joint 1994 federal individual income tax return (IRS form 1040), addressed to: Internal Revenue Service, Austin, Texas 73301, on or about March 3, 1998, by depositing the same in the outgoing mailbox located at the Wheat Ridge US Post Office at 4210 Wadsworth Blvd., Wheat Ridge, Colorado 80033. This was at least one month prior to the final deadline for filing this particular 1994 tax return.

11. I, myself, did personally prepare a preliminary work copy of this 1994 federal individual income tax return (IRS form 1040) in the late spring or early summer of 1995. A copy of this document was subsequently mailed, upon request, to the Student Financial Services office of RICE University, in Houston, Texas, in support of an application from our oldest daughter, Angela, for financial aid. This document was mailed to RICE University in the summer of 1995 and received by RICE on August 28, 1995. The substance of the information contained in this submitted "work copy" of our 1994 income tax return was the same as that on the final completed original 1040 form mailed to the IRS in March of 1998 (i.e. all numbers were the same).

12. From late Summer 1995 to October 1997, I worked away from home in Minnesota on a power plant construction project and did not work on preparing a final copy of our 1994 tax return during that time away from home. Upon completion of that assignment in Minnesota in the late fall of 1997 and relocation of our household from Stilwell, Kansas, to Wheat Ridge, Colorado, in late 1997 and early 1998. I proceeded to complete our 1994 federal individual income tax return in February of 1998. I completed this 1994, 1040 form by March 1, 1998 and subsequently mailed it, as previously stated herein paragraph 10, at least one month ahead of the deadline for submitting this particular return.

13. In addition, during the summer of 1995, I requested, via telephone, that the IRS provide me with a copy of their INPOL documents for my wife and I for the tax year 1994. This is basically a transcript of all income documents received by the IRS and has in previous years been available to me for use in preparing our taxes. This document gives accurate income information reported to the IRS from income sources like

employers, banks, credit unions, mutual funds, etc. For the tax year 1994. I felt I would benefit by obtaining and using this document to help me finalize our 1994 Tax Return.

14. I received a written correspondence from the IRS dated August 31, 1995 indicating they had not yet processed the information I had requested. By February of 1998, following several repeated inquiries concerning this INPOL report, I had not received the information I had requested. Therefore, I completed and filed our 1994 tax return as previously indicated without benefit of this INPOL report (see Plaintiffs' Exhibit E attached herewith).

15. During the summer of 1998, following several months of waiting for our 1994 income tax refund, I spoke with an IRS agent, via telephone, who informed me that the IRS had no record of receiving our original 1994 tax return and that I should resubmit a *copy* of that original return which I had mailed in early March of 1998.

16. Towards the end of September 1998, I, myself, did personally resubmit, as recommended by that IRS agent, a *copy* of the previously mailed 1994 tax return. On October 2, 1998, this *copy* was received and date stamped by the IRS.

17. The IRS has since deemed that this date of "October 2, 1998", (the date the IRS received the *copy*) as the date the IRS received our original 1994 tax return. This is not the case (please see Plaintiffs' letter to IRS dated February 19, 1999, included with Complaint and marked as Plaintiffs' Exhibit D).

18. To date my wife, Joann, and I have not received our refund of overpayment of withholding for tax year 1994 in the amount of $8,551.00.

FURTHER AFFIANT SAITH: that I declair [sic] under penalty of perjury that the foregoing is true and correct to the best of my knowledge, understanding, information and belief.

State of Colorado
County of Jefferson

Rolly J. Sorrentino
appeared before me this
1st day of November
[Illegible]

/s/ Mary Ellen Young
Notary Public

Commission Expires
November [Illegible]
[Illegible]
Wheat Ridge, Colorado 80033

/s/ Rolly J. Sorrentino
Rolly J. Sorrentino
4175 Teller Street
Wheat Ridge, Colorado
80033
(803) 424-1159

[SEAL]

Supreme Court, U.S.
FILED
JUN 27 2005
OFFICE OF THE CLERK

No. 04-1396

In The Supreme Court of the United States

ROLLY J. SORRENTINO
and JOANN M. SORRENTINO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

PAUL H. SCHWARTZ
COOLEY GODWARD LLP
380 Interlocken Crescent
Suite 900
Broomfield, Colorado
80021-8023
(720) 566-4000

MATTHEW D. BROWN
Counsel of Record
COOLEY GODWARD LLP
One Maritime Plaza
20th Floor
San Francisco, California 94111
(415) 693-2000

LORI R.E. PLOEGER
COOLEY GODWARD LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, California 94306
(650) 843-5123

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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OTHER AUTHORITIES

SOI Bulletin, *Selected Returns and Forms Filed or To Be Filed by Type During Specified Calendar Years 1980-2005*, Historical Table, Fall 2004 (Jan. 2005), *available at* <<http://www.irs.gov/taxstats/article/0,,id=97230,00.html>> 3

Timely Mailing Treated as Timely Filing, 69 Fed. Reg. 56,277 (2004) 2, 3

I. ARGUMENT

A. Contrary to the Government's Contentions, the Tenth Circuit's Decision Conflicts with Cases Applying the Common-Law Mailbox Rule and Section 7502 Precedent.

This case presents the Court with an opportunity to resolve whether the common-law mailbox rule survived the enactment of 26 U.S.C. § 7502 of the Internal Revenue Code, a matter as to which the government acknowledges there is a deep split in the circuit court case law. (Opp. Br. at 5-7.) And, contrary to the government's contentions, it also squarely presents the issue of what evidence is sufficient to invoke the presumptions afforded by the mailbox rule.

The Tenth Circuit's decision in this case conflicts with decisions of this Court and the circuit courts holding that a party's credible testimony suffices to invoke the mailbox rule's presumptions. (Petition at 11-12.) The government perfunctorily dismisses this conflict on the basis that these decisions do not involve Section 7502 (Opp. Br. at 8), ignoring that these cases address the issue squarely presented here: what proof suffices to invoke the presumptions of the common-law mailbox rule. In *Hagner* and *Rosenthal*, this Court applied the mailbox rule based on the senders' credible testimony about the circumstances of the documents' dispatch. *Hagner v. United States*, 285 U.S. 427, 429 (1932); *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884); *see also Schikore v. BankAmerica Supp. Retirement Plan*, 269 F.3d 956, 964 (9th Cir. 2001); *Godfrey v. United States*, 997 F.2d 335, 338 (7th Cir. 1993). These holdings directly conflict with the independent evidence requirement imposed by the Tenth Circuit in this case.

The government also attempts to gloss over the conflict between the Tenth Circuit's decision in this case and the Ninth Circuit's decisions in *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992) and *Lewis v. United States*, 144 F.3d 1220 (9th Cir. 1998), by characterizing these decisions as requiring "proof of postmark." (Opp. Br. at 7.) That is a gross oversimplification of Ninth Circuit precedent. After *Lewis*, it is clear that the Ninth Circuit does not require direct proof of a postmark, but rather that "if a taxpayer furnishes credible evidence of the date her letter to the Service was postmarked, that date is the date that controls." *Lewis*, 144 F.3d at 1223; *id.* at 1224 (White, J., dissenting) (noting that unlike the *Lewis* majority's holding, *Anderson* required "direct" proof of a postmark). A few years later, the Ninth Circuit in *Schikore*, citing *Lewis*, stated: "We have held a sworn statement is credible evidence of mailing for purposes of the mailbox rule." 269 F.3d at 964. The Tenth Circuit's holding in this case that a taxpayer must produce "independent evidence" of mailing conflicts with the Ninth Circuit's decisions in *Lewis* and *Anderson* and its later decision in *Schikore*.

B. The Proposed Regulations Do Nothing to Undermine the Urgent Need for This Court's Review.

The government also argues that this case is inappropriate for review because the IRS has issued proposed regulations regarding how a taxpayer may prove a timely filing. (Opp. Br. at 8 (citing *Timely Mailing Treated as Timely Filing*, 69 Fed. Reg. 56,277 (2004).)

The government, however, gives no indication of when and whether these proposed regulations will become final and effective. Moreover, the government makes no attempt

to explain how these regulations, even if they become final, would "eliminate any dispute about the application of the common-law mailbox rule to documents subject to Section 7502." (Opp. Br. at 8-9.)

Braxton v. United States, 500 U.S. 344 (1991), cited by the government, does not support the government's contention that the proposed regulations somehow make review inappropriate. In *Braxton*, the Court declined to reach the interpretation of a particular sentencing guideline because the Sentencing Commission had indicated it would amend that provision. But the Court emphasized that Congress expressly gave the Sentencing Commission the power and the duty "periodically [to] review and revise" the guidelines, and also expressly gave the Commission the power to decide whether any amendments to the guidelines would be retroactive. *Id.* at 348 (alteration in original). By contrast, the issue here is not a matter of interpreting an IRS regulation but determining whether Congress intended to retain the common-law mailbox rule following passage of Section 7502 and how the mailbox rule can be satisfied.

And in any event, the proposed regulations by their terms would apply only *prospectively*. *See* 69 Fed. Reg. at 56,278. Given the three-year statute of limitations period for violations of the internal revenue laws, 26 U.S.C. § 6531, a huge number of taxpayers will still be affected by the uncertainty and inconsistency created by the split between the Circuits on how a taxpayer can prove a tax document was timely filed. In 2001, 2002, and 2003, respectively, more than 130 million people filed individual income tax returns. *See* SOI Bulletin, *Selected Returns and Forms Filed or To Be Filed by Type During Specified Calendar Years 1980-2005*, Historical Table, Fall 2004

(Jan. 2005), *available at* <<http://www.irs.gov/taxstats/article/0,,id=97230,00.html>>.

In sum, nothing about the proposed regulations undermines the urgent need for this Court to provide certainty about what proof will suffice to show timely mailing of a tax document.

II. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL H. SCHWARTZ
COOLEY GODWARD LLP
380 Interlocken Crescent
Suite 900
Broomfield, Colorado
80021-8023
(720) 566-4000

MATTHEW D. BROWN
Counsel of Record
COOLEY GODWARD LLP
One Maritime Plaza
20th Floor
San Francisco, California 94111
(415) 693-2000

LORI R.E. PLOEGER
COOLEY GODWARD LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, California 94306
(650) 843-5123

Counsel for Petitioners